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In the Supreme Court of the United States

KENDALL TANKERSLEY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a Sentencing Guidelines departure should be subject to appellate review that is conducted prior to, and distinctly from, review of the ultimate sentence for reasonableness, a question as to which the courts of appeals are divided.

2. Whether the holding in *Williams v. United States*, 503 U.S. 193 (1992) that a sentencing court's use of an erroneous ground for departure constitutes an incorrect application of the Guidelines remains valid after *United States v. Booker*, 543 U.S. 220 (2005).

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PETITION FOR A WRIT OF CERTIORARI

Kendall Tankersley, through counsel, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-35a) is reported at 537 F.3d 1100. The sentencing decision of the district court is unreported. Transcripts of the portions of the two sentencing hearings that reflect the district court's sentencing decision are appended hereto. (App., *infra*, 36a-67a.)

JURISDICTION

The court of appeals' judgment was entered August 12, 2008. A timely petition for rehearing was denied on December 1, 2008 (App., *infra*, 68a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The following statutory and Guidelines provisions are reproduced in the appendix: 18 U.S.C. § 3553(a)(5); 18 U.S.C. § 3742(a), (b) & (f); U.S.S.G. § 5K2.0 (2000); U.S.S.G. § 3A1.4 (2000); U.S.S.G. § 5K2.15 (1989). (App., *infra*, 69a-76a.)

STATEMENT OF THE CASE

A. Background

This Court's rulings in *United States v. Booker*, 543 U.S. 220 (2005), marked a sea change in federal sentencing law and practice nationwide, eliminating the mandatory nature of the U.S. Sentencing Guidelines. After *Booker*, district courts are required to calculate the applicable Guidelines range, but have discretion to impose a sentence at variance from the Guidelines through an application of the statutory factors set forth at 18 U.S.C. § 3553(a).

In the several years since *Booker*, the U.S. Courts of Appeals for the First, Second, Third, Fourth, Fifth, Sixth, Eighth, Tenth, and Eleventh circuits have continued to review Guidelines departures as part of their determination of whether the district court correctly applied the Guidelines.[1]

The U.S. Courts of Appeals for the Seventh and Ninth Circuits, however, have ceased reviewing departures according to pre-*Booker* constraints on

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[1] *See, e.g.*, *United States v. Wallace*, 461 F.3d 15, 32-33 (1st Cir. 2006); *United States v. Selioutsky*, 409 F.3d 114, 118-19 (2d Cir. 2005); *United States v. Vargas*, 477 F.3d 94, 103 (3d Cir. 2007); *United States v. Moreland*, 437 F.3d 424, 433 (4th Cir. 2006); *United States v. Saldana*, 427 F.3d 298, 310-13 (5th Cir. 2005); *United States v. Jackson*, 408 F.3d 301, 304 (6th Cir. 2005); *United States v. Spotted Elk*, 548 F.3d 641, 669-70 (8th Cir. 2008); *United States v. Munoz-Tello*, 531 F.3d 1174, 1186 (10th Cir. 2008); *United States v. Crawford*, 407 F.3d 1174, 1178 (11th Cir. 2005).

departure authority. Not long after *Booker* was decided, the Seventh Circuit decreed that "the concept of 'departures' has been rendered obsolete in the post-*Booker* world." *United States v. Arnaout*, 431 F.3d 994, 1003 (7th Cir. 2005); *see also United States v. Johnson*, 427 F.3d 423, 426 (7th Cir. 2005). Soon thereafter, the Ninth Circuit acknowledged the circuit split and adopted the Seventh Circuit's approach. *United States v. Mohamed*, 459 F.3d 979, 987 (9th Cir. 2006). The *Mohamed* Court characterized the concept of departures as "anachronistic" and held that "any post-*Booker* decision to sentence outside of the applicable guidelines range is subject to a unitary review for reasonableness, no matter how the district court styles its sentencing decision." *Id.*

The U.S. Court of Appeals for the District of Columbia has acknowledged the circuit split but declined to choose sides. *United States v. Olivares*, 473 F.3d 1224, 1229-30 (D.C. Cir. 2006).[2]

This Court addressed post-*Booker* appellate review of federal sentences in *Rita v. United States*, 551 U.S. 338, 127 S.Ct. 2456, 2462 (2007), holding that the courts of appeals may apply a rebuttable "presumption of reasonableness to a district court sentence that reflects a proper application of the Sentencing Guidelines."

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[2] The D.C. Circuit's more recent discussion of U.S.S.G. § 4A1.3(a)(3)'s prohibition on the use of a defendant's prior arrest record as the basis for an upward departure suggests that departures are not deemed "obsolete" or "anachronistic" in that circuit. *United States v. Brown*, 516 F.3d 1047, 1053 & n.4 (D.C. Cir. 2008).

This Court then summarized post-*Booker* district court and appellate sentencing procedures in *Gall v. United States*, 128 S.Ct. 586 (2007). The Court pronounced that "[a]s a matter of nationwide administration and to secure nationwide consistency, the Guidelines should be the starting point and the initial benchmark [for the district court's sentencing decision]." 128 S.Ct. at 596. *Gall* further explained that if the district court decides that an "outside-Guidelines sentence is warranted," it must:

> consider the extent of the deviation and ensure that the justification is sufficiently compelling to support the degree of the variance. We find it uncontroversial that a major departure should be supported by a more significant justification than a minor one.

Id. at 597.[3]

With respect to appellate sentencing review, *Gall* instructed that a court of appeals:

> must first ensure that the district court committed no significant procedural error, such as failing to calculate (or improperly calculating) the Guidelines

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[3] Notwithstanding *Gall*'s use of the term "departure," the facts of that case involved a district court's exercise of its discretion under *Booker* to impose a sentence at variance from the Guidelines in accordance with the factors set forth in 18 U.S.C. § 3553(a). 128 S.Ct. at 593.

> range . . . or failing to adequately explain the chosen sentence—including an explanation for any deviation from the Guidelines range.

Id.

Last year this Court reaffirmed the distinction between departures and variances in *Irizarry v. United States*, 128 S.Ct. 2198 (2008). *Irizarry* held that advance notice of a contemplated variance was not required by due process or by Rule 32(h) of the Federal Rules of Criminal Procedure, which requires advance notice of a contemplated departure. 128 S.Ct. at 2202-04. As this Court explained, "'[d]eparture' is a term of art under the Guidelines and refers only to non-Guidelines sentences imposed under the framework set out in the Guidelines." *Id.* at 2202.

B. District Court Sentencing Proceedings

Ms. Tankersley was sentenced on her plea of guilty to a three-count Information charging conspiracy, aiding and abetting attempted arson, and aiding and abetting arson. After two sentencing hearings, the district court sentenced Ms. Tankersley to 41 months of incarceration.

The jurisdiction of the district court was proper under 18 U.S.C. § 3231.

Having ruled that Ms. Tankersley's offenses did not qualify for the terrorism enhancement, U.S.S.G. § 3A1.4 (2000), the district court nonetheless applied a 12-level upward departure

under U.S.S.G. § 5K2.0 (2000) in order to create parity between Ms. Tankersley and those co-conspirators whose offenses did qualify for the terrorism enhancement.

The district court then granted a 6-level downward departure for a combination of strong mitigating circumstances presented by Ms. Tankersley's case and personal characteristics and history, including her early withdrawal from the conspiracy, her complete rehabilitation in the intervening seven years until her arrest, the genuineness of her remorse, her substantial assistance, and the district court's prediction that Ms. Tankersley would never again violate the law.

The 41-month sentence ultimately imposed by the district court represented the bottom of the resulting guideline range. However, the bottom of that range had been more than tripled by the application of the 12-level upward departure.

The district court also sentenced nine other members of the conspiracy. It was undisputed that Ms. Tankersley was one of the least culpable members of the overall conspiracy. For each of the ten co-conspirators, the district court imposed a sentence within what the district court believed to be the correctly calculated guideline range, after taking into account whether the terrorism enhancement applied and the government's motions for downward departures due to substantial assistance.

C. The Court of Appeals' Decision

Ms. Tankersley's sentencing appeal raised four distinct legal challenges to the district court's upward departure. (Appellant's Opening Brief (in the Ninth Circuit) at 26-34.) Three of these challenged the propriety of the court's decision to upwardly depart at all, while the fourth challenged the magnitude of the upward departure. (*Id.*) The court of appeals adjudicated only the first of these challenges, holding that the district court's decision to impose a 12-level upward departure as an analog to the terrorism enhancement set forth in U.S.S.G. §3A1.4 (2000), which the court had deemed inapplicable, did not render Ms. Tankersley's sentence per se unreasonable. (App., *infra*, 25a-29a.)

The court of appeals expressly declined to adjudicate the second and third challenges to whether any Guidelines departure by analogy to the terrorism enhancement was authorized under U.S.S.G. § 5K2.0:

> Tankersley also challenges the upward departure as being unwarranted under § 5K2.0 because there were no aggravating circumstances that were not adequately taken into consideration by the Sentencing Commission and because there was no evidence of harm sufficient to remove Tankersley's offense from the heartland of arson offenses. After *Booker*, the scheme of downward and upward departures has been replaced by the requirement that

> judges impose a reasonable sentence. *Mohamed*, 459 F.3d at 986. Where, as here, a district court frames its analysis in terms of a downward or upward departure, we treat the "so-called departure[ ] as an exercise of post-*Booker* discretion to sentence a defendant outside of the applicable guidelines range," and "any post-*Booker* decision to sentence outside of the applicable guidelines range is subject to a unitary review for reasonableness, no matter how the district court styles its sentencing decision." *Id.* at 987.
>
> . . .
>
> In other words, we do not need to consider whether the district court correctly applied the departure provision in § 5K2.0; rather we review the district court's deviation from the applicable guidelines range for reasonableness. *Id.* at 989.

(App., *infra*, 29a-31a (citation omitted).)

Additionally, the court of appeals implicitly declined to review Ms. Tankersley's challenge to the magnitude of the departure. The court of appeals failed to acknowledge that claim and did not even mention what Ms. Tankersley's guideline range would have been absent the departure. (App., *infra*, 1a-35a.)

The court of appeals rejected Ms. Tankersley's claim that this Court's decision in *Irizarry*, 128 S.Ct.

2198, undermined the Ninth Circuit's ruling in *Mohamed*, 459 F.3d 979. (App., *infra*, 30a-31a n.11.)

Concluding that Ms. Tankersley's 41-month sentence was reasonable, the court of appeals affirmed the district court's sentence. (App., *infra*, 31a-35a.)

REASONS FOR GRANTING THE PETITION

This case squarely presents the important and frequently recurring question of how federal appellate courts should review departures from the Sentencing Guidelines. This matter involves a threshold principle of appellate procedure that logically calls for national uniformity. A nine-to-two circuit split currently exists, however, which this Court alone can resolve.

The case raises the related question of whether the entire concept of departures has become "obsolete" or "anachronistic" post-*Booker*, as the Seventh and Ninth Circuits have respectively stated. *Arnaout*, 431 F.3d at 1003; *Mohamed*, 459 F.3d at 987. Such rhetoric affects not only appellate courts but also impacts the sentencing procedures followed by district courts. Only this Court can provide the clear guidance necessary to restore sound sentencing review to all the courts of appeals and sensible sentencing procedures to the district courts nationwide.

Moreover, the court of appeals decision violates this Court's precedent by ignoring *Williams v. United States*, 503 U.S. 193 (1992). *Williams* held that a sentencing court's use of an invalid departure

ground constitutes an incorrect application of the Guidelines, requiring remand under 18 U.S.C. § 3742(f)(1) unless deemed harmless. 503 U.S. at 200-03. The Sentencing Reform Act of 1984 made clear that a party to a criminal case is entitled to appeal an incorrect application of the Guidelines by the district court. 18 U.S.C. § 3742(a)(2) (defendant's right) & (b)(2) (government's right). This statute also set forth detailed instructions for how appellate courts are to remedy erroneous sentences. 18 U.S.C. § 3742(f). Yet the court of appeals, relying on an approach rejected by nine other circuits, declined to address two of Ms. Tankersley's challenges to the legal basis for the district court's upward departure, determining instead that it did "not need to consider whether the district court correctly applied the departure provision in § 5K2.0." (App., *infra*, 31a.) Review by this Court is warranted in order to restore meaningful appellate review of sentencing departures across all circuits.

I. A Mature Circuit Split Exists Regarding The Fundamental Question Of Whether Appellate Review Of Guidelines Departures Is Necessary.

This case presents a circuit split on a threshold matter of procedure for appellate review of federal sentences. Eleven of the courts of appeals have now weighed in. The common law of sentencing departures continues to evolve as usual in most circuits, but in the Seventh and Ninth Circuits, it has become frozen in time in the pre-*Booker* era. District courts sitting in some states have been told to ignore departure methodology,

whereas district courts in adjacent states are required to apply the departure Guidelines correctly or risk likely reversal. This situation merits the intervention of this Court at this juncture to provide uniform guidance to the lower courts.

A. Nine of the Eleven Circuits To Have Resolved This Issue Have Correctly Held That Reviewing Courts Should Continue To Apply Departure Methodology.

Most courts agree that departure Guidelines remain an integral part of federal sentencing after *Booker*. Thus, courts of appeals in nine of the ten circuits to have addressed this issue have held that appellate review of Guideline departures continues in the post-*Booker* era. *See, e.g., United States v. Wallace*, 461 F.3d 15, 32-33 (1st Cir. 2006) (remanding for resentencing after finding plain error in district court's decision to upwardly depart based on valid and invalid grounds); *United States v. Selioutsky*, 409 F.3d 114, 118-19 (2d Cir. 2005) (remanding district court's downward departure for exceptional family circumstances to allow for additional fact-finding); *United States v. Vargas*, 477 F.3d 94, 103 (3d Cir. 2007) ("While it may be that the flexibility a variance affords will cause a decline in the use of traditional departures, the law still provides for departures, and we decline to find that they are obsolete or replaced."); *United States v. Moreland*, 437 F.3d 424, 433 (4th Cir. 2006) (traditional departures remain an important part of sentencing even after *Booker*); *United States v. Saldana*, 427 F.3d 298, 310-13 (5th Cir. 2005) (reviewing and affirming upward departure); *United States v. Jackson*, 408 F.3d 301, 303-05 (6th Cir.

2005) (reversing downward departure because district court's list of reasons was insufficient to support the departure); *United States v. Spotted Elk*, 548 F.3d 641, 669-70 (8th Cir. 2008) ("A departure occurs within the context of the Guidelines themselves, which prescribe that the sentencing court should depart from the Guidelines range in certain situations, as for example, when important circumstances of a particular case are not adequately taken into account by the Guidelines."); *United States v. Munoz-Tello*, 531 F.3d 1174, 1186 (10th Cir. 2008) (affirming upward departure and extent thereof with reference to pre-*Booker* case law regarding departures); *United States v. Crawford*, 407 F.3d 1174, 1178 (11th Cir. 2005) (holding that district court erred in granting downward departure for substantial assistance pursuant to U.S.S..G. § 5K.1.1 where government had not filed the motion required under that Guideline).

The reasoning of this overwhelming majority of Circuits is persuasive. One of the fundamental lessons of *Booker* is that "district courts, while not bound to apply the Guidelines, must consult these Guidelines and take them into account when sentencing." 543 U.S. at 264. Surely this refers to all of the Guidelines, including the departure Guidelines. *See also* 18 U.S.C. 3553(a)(5) (mandating that district courts consider pertinent policy statements issued by the Sentencing Commission). Indeed, the departure Guidelines have been an integral part of the Guidelines system since its inception. U.S.S.G. § 1A1.1, Pt. A, intro. comment., ¶ 4.(a) ("The Guidelines' Resolution of Major Issues" – "Departures"). Thus, in *Rita*, this Court noted that a defendant may argue "*within the*

Guidelines' framework" for a departure from the otherwise applicable Guidelines range. 551 U.S. 338, 127 S.Ct. at 2461. A mandate that district courts consult and take into account Guidelines has little force if a district court's misapplication of a departure Guideline is not subject to any direct appellate review.

As the Eleventh Circuit explained in *Crawford*, *Booker's* requirement that the district courts consult the Guidelines "at a minimum, obliges the district court to calculate *correctly* the sentencing range prescribed by the Guidelines." 407 F.3d at 1178. Referring in conclusion to both an erroneous offense level adjustment and an erroneous downward departure, the *Crawford* court held that "true consultation cannot be based on an erroneous understanding of the Guidelines." *Id.* at 1183.

This Court's recent federal sentencing decisions reiterate the importance of accurate Guidelines calculations and the formal role played by the departure Guidelines in those calculations. In *Gall*, 128 S. Ct. at 597, this Court explained that "the Guidelines should be the starting point and the initial benchmark" for the sentencing court." Thus, an appellate court reviewing a federal sentence "must first ensure the district court committed no significant procedural error, such as failing to calculate (or improperly calculating) the Guidelines range . . . ." *Id.* Presumably, "the Guidelines" means the complete Guidelines, and "the Guidelines range" means the final Guidelines range arrived at after application of *all* of the provisions of the Guidelines, including the departure Guidelines.

The existence of a direct circuit conflict surrounding this issue is undeniable. Acknowledging the contrasting approach followed in the Seventh and Ninth Circuits, the Third Circuit has stated, "the law still provides for departures, and we decline to find that they are obsolete or replaced." *Vargas*, 477 F.3d at 103. Similarly, the Fourth Circuit has stated:

> We note that the continuing validity of departures in post-*Booker* federal sentencing proceedings has been a subject of dispute among the circuits . . . . We believe, however, that so-called "traditional departures" – *i.e.*, those made pursuant to specific guideline provisions or case law – remain an important part of sentencing even after *Booker*.

Moreland, 437 F.3d at 433. The Eighth Circuit has "urged the district courts to consider the departure and variance questions sequentially in order to facilitate appellate review." *Spotted Elk*, 548 F.3d at 670.

B. The Minority Approach Followed In The Seventh And Ninth Circuits Is Flawed, Is Insufficiently Deferential To District Courts, And Has Created Confusion.

1. In *Mohamed*, the Ninth Circuit explained that it was "elect[ing] to review the district court's application of the guidelines only insofar as they do not involve departures." 459 F.3d at 979. There is nothing in this Court's post-*Booker*

sentencing jurisprudence that would support the minority approach reviewing the application of only some, but not all, of the Sentencing Guidelines.

To the contrary, this Court recently expressed its disagreement with an amicus for having suggested "a puzzling distinction between incorrect applications of the Sentencing Guidelines, controlled by 3742(f)(1), and erroneous departures from the Guidelines, covered by 3742(f)(2)." *Greenlaw v. United States*, 128 S.Ct. 2559, 2568 (2008) (holding that a defendant's sentence may not be increased on appeal where the government did not cross appeal the sentence). As the *Greenlaw* opinion reasoned, "We do not see why Congress would want to differentiate Guidelines decisions this way." *Id.*

Equally important, the holding and analysis in *Irizarry* emphasize the bright-line distinction between departures and variances from the Guidelines. 128 S.Ct. 2198 (holding that variances from the Guidelines do not require the advance notice required for departures). As this Court stated in *Irizarry*, "'[d]eparture' is a term of art under the Guidelines and refers only to non-Guidelines sentences imposed under the framework set out in the Guidelines." *Id.* at 2202. By contrast, the court of appeals here explained that "[a]fter *Booker*, *the scheme of downward and upward departures has been replaced* by the requirement that judges impose a reasonable sentence." (App., *infra*, 29a (citing *Mohamed*, 459 F.3d at 986) (emphasis added).) These competing views of departures are irreconcilable. Yet the court of appeals here ruled that the *Irizarry* opinion did not undermine *Mohamed* or alter the rule that the Ninth Circuit

would decline to review Guideline departures. (App., *infra*, 30a-31a, n.11.)

Thus, under the current state of the law in the Seventh and Ninth Circuits, a district court's adequately noticed but substantively erroneous departure is not subject to appellate review. By contrast, a district court's inadequately noticed departure triggers automatic reversal. The notice provisions exist to ensure that the grounds for the sentence imposed are subject to sufficient adversarial testing, with the overarching purpose of increasing the soundness of district court sentencing decisions by ensuring "that all relevant matters relating to a sentencing decision have been considered before the final sentencing determination is made." *Irizarry*, 128 S.Ct. at 2203-04. Yet the minority approach teaches sentencing courts and litigants that the propriety of a departure as such is irrelevant, as long as the ultimate sentence appears "reasonable" to the reviewing court.

Review in the Supreme Court is warranted by the confusion and ill effects that inevitably will follow if the court of appeals decision remains good law. *See United States v. Autery*, No. 07-30424, ___ F.3d ___, 2009 WL 349801, at *12 (9th Cir. Feb. 13, 2009) ("We readily concede that in this post-*Booker* era lower courts may occasionally feel a little like Hansel and Gretel, looking for the now-missing breadcrumbs that would lead us back to clarity in sentencing."). Allowing two circuits to excise the departure Guidelines from the remainder of the Guidelines subject to appellate review can only undermine "the nationwide consistency" that this Court spoke of in *Gall*. 128 S.Ct. at 596.

2. The minority approach's blurring of departures and variances also violates the general principle of appellate review that district court decisions are entitled to deference. In most circuits, if the district court imposes a sentence based on an invalid Guidelines departure, the case will be remanded so that the district court may decide, in the first instance, what sentence it would choose to impose when fully advised by what the true Guidelines range would be, given the invalidity of the departure. By contrast, the Seventh and Ninth Circuits have adopted a blanket assumption that, if the erroneous departure were reversed, the district court would nonetheless impose exactly the same sentence on remand by applying a variance instead. At best, this assumption is sheer speculation; at worst, it reflects a view that all district courts engage in result-oriented sentencing processes in the post-*Booker* era. The advisory Guidelines are meant to provide advice and guidance to a district court that is meaningful and that might influence the court's sentencing decision. The requirement of consultation with the correctly calculated Guidelines should not be dispensed with so easily.

Even with the expanded discretion afforded by *Booker*, district courts usually sentence federal criminal defendants within the correctly calculated advisory Guidelines range. As *Gall* instructs, "the Guidelines should be the starting point and the initial benchmark" for the district court's sentencing determination. 128 S.Ct. at 596. The minority approach, by failing to allow the district court to impose sentence in the first instance based on a correct application of all of the Guidelines, including

the departure Guidelines, renders this exhortation from *Gall* an empty formality.

The minority approach is also at odds with the legal principle that appellate courts should remand for resentencing if the district court's sentencing decision resulted from a misapprehension about its departure or variance authority. In such circumstances, rather than affirming any sentence that falls within the wide range of reasonableness, federal courts routinely remand for resentencing.

3. The minority approach fails to recognize that its own reasonableness review may be negatively impacted by an unreviewed, erroneous departure underlying a sentencing decision. As the Third Circuit recently summarized,

> [W]hile "the district court is free to make its own reasonable application of the § 3553(a) factors, and to reject (after due consideration) the advice of the Guidelines," *Kimbrough [v. United States]*, 128 S.Ct. [558,] 577 [(2007)] (Scalia, J., concurring), it must first duly consider the correct Guidelines. Thus, a district court's incorrect Guidelines calculation will thwart not only its ability to accomplish the analysis it is to undertake, but our reasonableness review as well.

United States v. Langford, 516 F.3d 205, 215 (3d Cir. 2008).

With the minority approach, the appellate court is necessarily affirming a hypothetical variance that has not been adequately explained by the district court. In the majority approach circuits, by contrast, the requirement that a district court adequately explain any variance from the Guidelines has been rigorously enforced. *See, e.g., United States v. Smalley*, 517 F.3d 208, 215 (3d Cir. 2008), (finding Guidelines application error and declining to affirm sentence even though district court had issued an "alternative sentence" explaining that it would have reached the same result via a variance, given the inadequate explanation for the resulting 8-month variance from the top of the correctly calculated Guidelines range).

Moreover, at least one judge in the Ninth Circuit has recently complained that "[a]buse of discretion as now applied in this circuit to the substantive review of sentences for reasonableness is nothing more than a standardless and empty formalism—it comes close to no review at all." *Autery*, 2009 WL 349801, at *13 (Tashima, J., dissenting).

4. Based on the guidance they have received from their respective courts of appeals, district courts in the Seventh and Ninth Circuits reasonably may conclude that they are to ignore Guidelines departures. However, the Sentencing Reform Act mandates that district courts consider the departure Guidelines in determining the sentence to be imposed. 18 U.S.C. § 3553(a)(5). In *United States v. Zolp*, 479 F.3d 715, 721 (9th Cir. 2007), the Ninth Circuit discussed a sentencing in which the government had moved for a substantial

assistance downward departure pursuant to U.S.S.G. § 5K1.1,, but the district court refused to consider the defendant's cooperation in calculating the advisory guideline range, instead taking it into account in applying 18 U.S.C. § 3553. Such befuddlement was approved by the Ninth Circuit, relying on *Mohamed*. *Id.* at 721-22 ("The district court engaged in the correct analysis."). Thus, the Ninth Circuit has instructed the many district courts it reviews to ignore the departure Guidelines, which all district courts are statutorily mandated to consider. Only this Court can dispel such confusion.

II. The Court Of Appeals' Decision Violates This Court's Precedent In *Williams v. United States*, 503 U.S. 193 (1992) And The Sentencing Reform Act.

The approach followed in the Seventh and Ninth Circuits violates Supreme Court precedent and the Sentencing Reform Act of 1984. Before decreeing the Guidelines advisory in *Booker*, this Court had held "that a sentencing court's use of an invalid departure ground is an incorrect application of the Guidelines." *Williams v. United States*, 503 U.S. 193, 200 (1992). *Williams* further held that 18 U.S.C. § 3742(f)(1), a part of the Sentencing Reform Act that requires remand when the district court incorrectly applies the Guidelines, therefore requires remand when a sentencing court relies upon an invalid departure ground (unless the error may be deemed harmless). *Id.* at 201-03.

The Sentencing Reform Act granted federal criminal defendants the statutory right to obtain appellate review of a sentence that was imposed in

violation of the law and/or as a result of an incorrect application of the departure Guidelines. 18 U.S.C. § 3742(a)(1) & (a)(2). The government enjoys a parallel statutory right to appeal legally erroneous sentences and Guidelines determinations. 18 U>S.C. 3742(b)(1) & (b)(2).

Booker did not purport to overrule *Williams*. Moreover, although Justice Breyer's opinion of the court (in part) excised a separate subparagraph of 18 U.S.C. § 3742, it left paragraphs (a), (b), and (f) intact. *Booker*, 543 U.S. at 260 (excising 18 U.S.C. 3742(e)). The court of appeals decision below ignored the precedent of *Williams* and the intent of Congress by expressly declining to adjudicate two of Ms. Tankersley's legal challenges as to whether the district court's 12-level upward departure was based on a legally defensible ground. (App., *infra*, 29a-31a.)

In *Mohamed*, the Ninth Circuit summarized its choice to abandon review of Guidelines departures:

> [W]e side with the Seventh Circuit and we elect to review the district court's application of the advisory sentencing guidelines only insofar as they do not involve departures. To the extent that a district court has framed its analysis in terms of an upward or downward departure, we will treat such so-called departures as an exercise of post-*Booker* discretion to sentence a defendant outside of the applicable guidelines range.

459 F.3d at 987. The Ninth Circuit decision to abandon departure review was incorrect, however, because refusing to review the departure Guidelines violates *Williams* and 18 U.S.C. § 3742(a) & (f).

The court of appeals decision violates another aspect of *Williams* as well. In *Williams*, this Court was faced with the question of the appropriate remedy when a district court has based a departure on a combination of factors, both valid and invalid. 503 U.S. at 197-98. This Court held that:

> once the court of appeals has decided that the district court misapplied the [departure] Guidelines, a remand is appropriate unless the reviewing court concludes, on the record as a whole, that the error was harmless, *i.e.*, that the error did not affect the district court's selection of the sentence imposed.

Id. at 203. The minority approach applied by the court of appeals here, however, dictates that regardless of whether a sentence may be based on an erroneous departure, the sentence must be affirmed as long as the district court *could* have imposed the same sentence with a variance under 18 U.S.C. § 3553(a)–even if there is no evidence or indication in the record that the court *would* have done so. (App., *infra*, 29a-31a.)

The *Williams* court expressly criticized such an approach as insufficiently deferential to the sentencing court. 503 U.S. at 204 ("the dissent's position requires the appellate court to consider

whether the district court *could* have based its departure on the remaining [valid] factors, not whether it *would* still have chosen so to act."). As the Court concluded in *Williams*, "it is the prerogative of the district court, not the court of appeals, to determine, in the first instance, the sentence that should be imposed in light of certain factors properly considered under the Guidelines." *Id.* at 205; *cf. United States v. Anderson*, 526 F.3d 319, 329-30 (6th Cir. 2008) (questioning whether, in light of *Gall*, an incorrect Guidelines calculation can ever be deemed harmless); *Langford*, 516 F.3d at 215 ("We submit that the improper calculation of the Guidelines range can rarely be shown not to affect the sentence imposed.").

III. This Case Squarely Presents The Issues Presented For Certiorari Review, And The Incorrectness Of The Court of Appeals' Decision Is Evident.

The court of appeals' opinion notes but fails to address three of Ms. Tankersley's challenges to the propriety of the district court's 12-level upward departure.

1. First, the district court expressly declined to adjudicate Ms. Tankersley's argument that the district court's departure failed to meet the requirements of § 5K2.0 because it was not based upon an aggravating circumstance that the Sentencing Commission had inadequately taken into consideration in promulgating the Guidelines. (App., *infra*, 29a-31a.) This argument was strong, merited appellate review, and would have required reversal of the departure. As argued in Ms.

Tankersley's Opening Brief before the court of appeals, departures under § 5K2.0 are limited to situations in which "the court finds 'that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described." U.S.S.G. § 5K2.0 (2000); *see also* Appellant's Opening Brief at 26-27.) Because the Guidelines had taken the impact of terrorism on civilian targets into account in a previous terrorism enhancement Guideline, U.S.S.G. § 5K2.15 (1989), which was later removed and replaced with U.S.S.G. § 3A1.4, this circumstance was not one that the Sentencing Commission had failed to adequately take into consideration. (Appellant's Reply Brief at 11, 14.)

2. Second, the court of appeals also expressly declined to adjudicate Ms. Tankersley's claim that the district court's upward departure was unwarranted because there was no evidence of harm resulting from Ms. Tankersley's conduct that was sufficient to remove her offenses from the heartland of arson offenses. (App., *infra*, 29a-31a.) Again, Ms. Tankersley would have prevailed, had this claim been addressed on its merits. (*See* Appellant's Opening Brief at 27-29; Appellant's Reply Brief at 18-20.) The sole feature of the completed arson that distinguished this from any other arson of comparable economic damage was the communiqué that was written and distributed by Ms. Tankersley's co-conspirators; yet the district court stated, "the 12-level departure was not based on the conduct of composing this communiqué. It was

based on the conduct of committing the arson." (App., *infra*, 42a.)

3. Third, the court of appeals opinion does not even mention Ms. Tankersley's distinct challenge to the excessive degree of the district court's upward departure. (Appellant's Opening Brief at 29-34; Appellant's Reply Brief at 21-23.) In this respect, the court of appeals decision violates the spirit if not the letter of *Gall*, which held that review for substantive reasonableness must "take into account . . . the extent of any variance from the Guidelines range." 128 S.Ct. at 597. The district court's upward departure was 12 levels, an extraordinary magnitude by any measure, including pre-*Booker* Ninth Circuit precedent. *United States v. Roston*, 168 F.3d 377, 379 (9th Cir. 1999) (stating that a departure of only 7 levels was "substantial, and should not be lightly taken"); *United States v. Nagra*, 147 F.3d 875, 884-89 (9th Cir. 1998) (reversing 6-level upward departure that was based on immigration fraud involving 180 illegal immigrants); *United States v. Mathews*, 20 F.3d 185, 188 (9th Cir. 1997 (reversing 4-level upward departure as unreasonable because it was "greatly disproportionate").

Similarly, the court of appeals failed to address Ms. Tankersley's citation to *United States v. Leahy*, 169 F.3d 433, 438 (7th Cir. 1999), a procedurally similar case in which the Seventh Circuit reversed a 10-level upward departure as excessive, on the ground that the district court's analogy to the 12-level terrorism enhancement at U.S.S.G. § 3A1.4 was unreasonable because the

defendant's conduct did not qualify for that enhancement. (Appellant's Opening Brief at 29-30.)

In addition to arguing this body of case law before the court of appeals, Ms. Tankersley also explained that the district court's 12-level upward departure had the effect here of more than *tripling* the bottom of the otherwise applicable guideline range. (Appellant's Opening Brief at 32.) She pointed out that the 12-level upward departure more than offset *all* of the mitigating offense-level adjustments and departures applied to her: 2 levels for minor role in the offense, 3 levels for acceptance of responsibility, and 6 levels for substantial assistance. (*Id.* at 33.) And she explained that the 12-level departure had an equal or greater impact than would have occurred under the Guidelines had she simultaneously been sentenced (in addition to her counts of conviction) for an additional extremely serious felony that she did not commit: burglary of a residence, while possessing a firearm, with more than minimal planning, and resulting in a loss of more than $5 million. (*Id.* at 34.)

By ignoring pre-*Booker* constraints on the allowable extent of a district court's departure, the court of appeals opinion unduly and unjustifiably restricted appellate departure review well beyond the limitations of *Mohamed*. The *Mohamed* opinion includes a lengthy paragraph of reasoned analysis of statutory and case law justifying "the degree of the district court's deviation from the advisory guidelines." 459 F.3d at 989. Here, there was no analysis of the magnitude of the upward departure whatsoever. The court of appeals opinion fails to even acknowledge that Ms. Tankersley's sentence,

absent the 12-level upward departure, likely would have been only 12 months of imprisonment rather than 41 months.[4]

Moreover, the implicit assumption by the court of appeals that the district court would have imposed the same sentence on remand even if the departure were deemed erroneous is wholly unfounded here. The district court conducted a total of twelve sentencing hearings of ten individuals in connection with this conspiracy. (Ms. Tankersley and one other co-conspirator each received a second sentencing hearing to address their claims that they had not received sufficient notice of the possibility of the upward departures under § 5K2.0.) At each and every hearing, and for each and every individual, the district court issued a sentence within the calculated Guidelines range, rather than a sentence at variance from the Guidelines. Denying the district court the opportunity to sentence Ms. Tankersley based on a *correct* application of the Guidelines, *including the § 5K2.0 departure Guideline*, is inadequately deferential to the district court. Furthermore, such a result utterly fails to "promote the perception of fair sentencing." *Gall*, 128 S. Ct. at 597.

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[4] The 12-month figure is not arrived at through a rote subtraction of 12 offense levels (which would in fact yield a bottom-of-the-Guidelines-range of only 6 months) but rather from a principled recognition that the district court's subsequent downward departure for substantial assistance may have been smaller, had the court not first erroneously inflated the applicable Guidelines range with the 12-level upward departure.

The limited appellate review exemplified by the court of appeals' opinion in this case abandons two decades of case law illuminating these complex issues in favor of a form of reasonableness review that is uninformed by institutional guidance and historical perspective and entirely lacking in discernible objective standards. This Court has repeatedly emphasized that reasonableness review should be conducted with rigor in order to avoid a return to the risks of arbitrary decision-making in federal sentencing that Congress sought to reform when it created a system of empirically based Sentencing Guidelines safeguarded by meaningful appellate review of federal sentencing decisions. This Court should grant certiorari so that it may resolve the circuit split regarding the extent to which Guidelines departures are subject to appellate review and reaffirm the principles of *Williams* and the statutory basis for appellate review of Guidelines departures.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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MARCH 2009

APPENDIX A

UNITED STATES COURT OF APPEALS,
NINTH CIRCUIT

No. 07-30334

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE,
v.
KENDALL TANKERSLEY, AKA SARAH KENDALL HARVEY;
KENDALL, DEFENDANT-APPELLANT.

Argued: May 5, 2008
Filed: August 12, 2008

Before: RICHARD C. TALLMAN, RICHARD R. CLIFTON, and N. RANDY SMITH, Circuit Judges.

TALLMAN, Circuit Judge:

Kendall Tankersley appeals a 41-month sentence imposed following her guilty plea to a three-count Information charging her with conspiracy to commit arson and destruction of an energy facility in violation of 18 U.S.C. § 371, aiding and abetting attempted arson in violation of 18 U.S.C. §§ 2 and 844(i), and aiding and abetting arson in violation of 18 U.S.C. § 844(i). We have jurisdiction under 28 U.S.C. § 1291, and we affirm.

From 1996 through 2001, activist groups known publicly as the Earth Liberation Front ("ELF") and the Animal Liberation Front ("ALF") committed arson and other crimes against government and private entities in several Western states. The groups' membership changed over the lifetime of the conspiracy but included as many as sixteen conspirators. Tankersley actively participated in both an attempted and a subsequently completed arson that destroyed the headquarters building of U.S. Forest Industries, Inc., a private timber company located in Medford, Oregon.

The district court imposed a sentencing enhancement for the commission of a "federal crime of terrorism," pursuant to United States Sentencing Guidelines ("U.S.S.G." or "Sentencing Guidelines") § 3A1.4 (2000),[1] against several of Tankersley's co-defendants who targeted government property. The district court did not impose this enhancement on Tankersley because she targeted only private property. It did, however, impose a twelve-level upward departure pursuant to U.S.S.G. § 5K2.0, which had the effect of making her base offense level the same as if she had been subject to the terrorism enhancement.

Tankersley argues that her sentence is unreasonable and that the district court abused its discretion by imposing the upward departure. She argues that the terrorism enhancement should not

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[1] The parties stipulated that the 2000 version of the Sentencing Guidelines applied to these sentencing proceedings.

apply to her because she did not target government property, and that the twelve-level upward departure amounts to an imposition of the terrorism enhancement. She argues that the district court is not empowered to depart upward based on what she frames as its disagreement with congressional policy concerning the applicability of the terrorism enhancement, and she argues that there were insufficient aggravating circumstances to remove her offense from the heartland of arson offenses.

We must decide whether a sentence outside the applicable advisory guidelines range is per se unreasonable when it is based on the district court's efforts to achieve sentencing parity between defendants who engaged in similar conduct with some targeting government property and who were properly subject to the terrorism enhancement, and others targeting only private property who were not. We hold that such a sentence is not per se unreasonable. We also conclude that the district court did not clearly err by declining to apply a four-level downward adjustment for a minimal role in the offense. *See* U.S.S.G. § 3B1.2(a). In light of the district court's proper application of the statutory factors set forth in 18 U.S.C. § 3553(a), we hold that Tankersley's 41-month sentence is reasonable.

A

Over a five-year period beginning in October 1996 as many as sixteen individuals conspired to damage or destroy private and government property on behalf of ELF and ALF. The conspirators targeted government agencies and private entities they believed were responsible for degrading the

environment through timber harvesting, cruelty to animals, and other means. The conspiracy covered multiple crimes in five Western states and resulted in tens of millions of dollars in damage.[2] Following a

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[2] As summarized by the district court, the offenses included:

> arson of the Dutch Girl Dairy in Eugene, Oregon in December 1995; arson and attempted arson of the United States Forest Service (USFS) Ranger Station in Detroit, Oregon in October 1996; arson of the USFS Ranger Station in Oakridge, Oregon in October 1996; arson of Cavel West Meat Packing Plant in Redmond, Oregon in July 1997; arson of the Bureau of Land Management (BLM) Wild Horse Corrals near Burns, Oregon in November 1997; arson of the United States Department of Agriculture Animal Plant Health Inspection Service and Animal Damage Control Facility in Olympia, Washington in June 1998; arson and attempted arson of Redwood Coast Trucking Company and Wayne Bare Trucking Company in Arcata, California in September 1998; attempted arson of the BLM Wild Horse Corrals near Rock Springs, Wyoming in October 1998; arson of a ski resort near Vail, Colorado in October 1998; arson of U.S. Forest Industries in Medford, Oregon in December 1998; arson of Childers Meat Company in Eugene, Oregon in May 1999; arson of a Boise Cascade office in Monmouth, Oregon in December 1999; destruction of a high-voltage energy tower near Bend, Oregon in December 1999; arson of the Eugene Police Department West Campus Public Safety Station in Eugene, Oregon in September 2000; arson of Superior Lumber Company in Glendale, Oregon in January 2001; arson of Romania Chevrolet Truck Center in Eugene, Oregon in March 2001; arson of Jefferson Poplar Farm in Clatskanie, Oregon in May

ten-year investigation by local, state, and federal law enforcement agencies, federal indictments were returned in various United States district courts. The bulk of the prosecutions occurred in the District of Oregon with United States District Judge Ann L. Aiken presiding. After lengthy negotiations, all ten defendants agreed to proceed by way of criminal informations and pled guilty to conspiracy. Nine of the defendants also pled guilty to separate, substantive counts of arson and/or attempted arson. Three of those defendants have appealed their sentences. In this Opinion we address the arguments of Defendant-Appellant Kendall Tankersley.[3]

B

Tankersley moved to Eugene, Oregon, in 1995 to attend the University of Oregon. Soon thereafter she began participating in timber protests. In 1997, she was convicted of disorderly conduct and obstructing governmental administration after blocking a forest road and climbing onto logging trucks in protest of a timber harvest in Josephine County, Oregon. Just over a year later, Tankersley was convicted of criminal trespass and providing

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2001; arson of the University of Washington Horticulture Center in Seattle, Washington in May 2001; and arson of the BLM Litchfield Wild Horse and Burro Corrals near Susanville, California in October 2001.

[3] In Memorandum Dispositions filed simultaneously with this Opinion we affirm the sentences imposed by Judge Aiken on co-defendants Kevin Tubbs, No. 07-30250, and Jonathan Christopher Mark Paul, No. 07-30310.

false information to a police officer in connection with a protest at a Union Pacific rail yard.

It was during these early acts that Tankersley met and began dating Jacob Ferguson, a leader of ELF.[4] She told Ferguson about logging trucks in Humboldt County, California, that they could target for arson. And, in September 1998, the two placed incendiary devices under several of these logging trucks, destroying one at a cost of $40,000. The district court considered this information as relevant conduct in fashioning Tankersley's sentence, though neither Tankersley nor Ferguson was ever charged or convicted for these crimes. The district court accepted the facts in Tankersley's Presentence Report ("PSR") as true.

Three months later, Tankersley, Ferguson, and co-conspirator Kevin Tubbs agreed to target U.S. Forest Industries. The three participated in a "dry run" of the arson. Tankersley hid in a nearby ditch and acted as a lookout for Tubbs and Ferguson. Based on their reconnaissance, Tubbs, Tankersley, and Ferguson decided to recruit a fourth person.

On December 22, 1998, Tubbs, Ferguson, Tankersley, and the new recruit, Rebecca Rubin, drove to Medford, Oregon, in Tubbs's van. The van contained several white, five-gallon buckets filled with fuel. Tubbs dropped Tankersley off near her lookout position. She carried a two-way radio to

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[4] Ferguson cooperated with the investigators after he was charged with multiple crimes relating to separate incidents.

communicate with her three co-conspirators. After the others placed the incendiary devices and set the timing devices, they fled the scene of the crime and met Tankersley at a nearby paint store before driving back to Eugene, Oregon.

Tankersley and Ferguson began to scour newspaper articles in search of information about a fire at U.S. Forest Industries. Ferguson eventually learned that the incendiary devices had failed to ignite properly. He asked Tankersley to drive back to Medford to retrieve the devices. Although Tankersley returned to U.S. Forest Industries with another person and saw the un-ignited devices, she decided not to retrieve them.

Tankersley and Ferguson tried again on December 27, 1998. Tankersley agreed to meet Ferguson in Ashland, Oregon. She helped him gather materials to prepare new timing mechanisms for the incendiary devices. Tankersley then drove Ferguson to the neighborhood surrounding U.S. Forest Industries; she watched Ferguson's infant son in the car while Ferguson set the new timing devices on the buckets of fuel. This time the devices properly ignited. After Ferguson returned, Tankersley drove him and his son back to Ashland. She then drove Ferguson's son to a hotel in Dunsmuir, California, and registered in a hotel under a false name. Ferguson joined Tankersley at the hotel later that night.

The next day Tankersley returned to Eugene. She visited Tubbs at his residence, and Tubbs and Ferguson showed her a copy of a media communiqué

discussing the successful fire. In mid-January, Ferguson released the communiqué, which read:

Communiqué from the ELF for 12-26-98

> Happy fucking new year from the Earth Liberation Front! To celebrate the holidays, we decided on a bonfire. Unfortunately for U.S. Forest Industries, it was at their corporate headquarters office in Medford, Oregon. On the foggy night after Christmas when everyone was digesting their turkey and pie, Santa ['s ELFs dropped two five gallon buckets of diesel/unleaded mix and a one gallon jug with cigarette delays; which proved to be more than enough to get this party started. And after forty to fifty firefighters showed up to our party, they were unable to salvage anything, costing these greedy bastards half a million dollars. This was done in retribution for all the wild forests and animals lost to feed the wallets of greedy fucks like Jerry Bramwell, U.S.F.I. president. This action is payback and it is a warning, to all others responsible we do not sleep and we won't quit. For the future generations we will fight back.

After the U.S. Forest Industries fire, Tankersley helped research possible attacks on the United States Bureau of Land Management wild horse facility in Litchfield, California, and Boise

Cascade Corporation's regional headquarters in Monmouth, Oregon. Although both facilities were eventually destroyed through arson Tankersley did not further participate in setting those fires.

Tankersley abandoned her active participation in the conspiracy sometime in 1999 and moved to Arcata, California, to attend Humboldt State University. She obtained a molecular biology degree in 2004 and moved to Flagstaff, Arizona, in 2005 to apply to medical schools. On December 7, 2005, seven years after the U.S. Forest Industries arson, Tankersley was arrested on a federal warrant in Flagstaff.

C

Tankersley joined the other nine defendants in challenging the government's suggested application of the terrorism enhancement under U.S.S.G. § 3A1.4. The district court conducted a joint hearing on May 15, 2007. It issued a 46-page Memorandum Opinion on May 21, 2007, explaining its sentencing rationale.

The district court focused on the plain language of the Sentencing Guidelines enhancement. Section 3A1.4 provides:

> (a) If the offense is a felony that involved, or was intended to promote, a federal crime of terrorism, increase by 12 levels; but if the resulting offense level is less than level 32, increase to level 32.

> (b) In each such case, the defendant's criminal history category from Chapter Four (Criminal History and Criminal Livelihood) shall be Category VI.

"Federal crime of terrorism" is defined in 18 U.S.C. § 2332b(g). Section 2332b(g)(5) provides, in pertinent part:

> [T]he term "Federal crime of terrorism" means an offense that-
>
> (A) is calculated to influence or affect the conduct of government by intimidation or coercion, or to retaliate against government conduct; and
>
> (B) is in violation of section ... 844(f)(2) or (3) (relating to arson and bombing of Government property risking or causing death), 844(i) (relating to arson and bombing of property used in interstate commerce)....

The district court read the guidelines to mean that the terrorism enhancement applies only if the "offense of conviction involved or was intended to promote an enumerated offense intended to influence, affect, or retaliate against government conduct." *See also United States v. Graham*, 275 F.3d 490, 514-18 (6th Cir. 2001) (discussing the elements of the terrorism enhancement).

The district court also addressed the government's burden of proof. It noted that our case law states that, "when a sentencing factor has an extremely disproportionate effect on the sentence relative to the offense of conviction, due process requires that the government prove the facts underlying the enhancement by clear and convincing evidence." *United States v. Jordan,* 256 F.3d 922, 926 (9th Cir. 2001). Because application of the terrorism enhancement increased the guidelines range beyond the statutory maximum for some of the defendants, increased the offense level by more than four, and more than doubled the length of the sentence authorized by the initial guidelines range for all ten defendants, the district court concluded that application of the enhancement warranted a higher burden of proof. In other words, the district court held that the government had to present "clear and convincing evidence that defendants' offenses of conviction involved or were intended to promote 'federal crimes of terrorism' as defined under § 2332b(g)(5)(B)."[5]

Having provided the defendants with a detailed explanation of how it intended to apply the terrorism enhancement, the district court then reminded the defendants of its ability to adjust the sentence based on other factors. Specifically, it advised the defendants that "[r]egardless of whether

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[5] The government does not challenge the district court's application of the clear and convincing evidence standard. We assume, without deciding, that the district court applied the correct standard.

the enhancement technically applies, the court retains discretion to depart upward or downward in determining the appropriate sentencing range and to impose a sentence that takes into account the nature and circumstances of the offenses and the history and characteristics of each defendant." *See* 18 U.S.C. § 3553(a); U.S.S.G. § 5K2.0.

D

We turn now to Tankersley's individual sentencing proceedings. The PSR calculated a total offense level of 28. The three counts were grouped together under U.S.S.G. § 3D1.2, resulting in a base offense level of six. The PSR calculated the actual loss caused by the arson at $990,220, equating to a thirteen-level increase under U.S.S.G. § 2B1.3. It also recommended a two-level increase under § 2B1.3(b)(3) because the offense involved more than minimal planning, but awarded Tankersley a two-level decrease as a minor participant, *see* U.S.S.G. § 3B1.2(b). The probation officer rejected Tankersley's request for a minimal role adjustment-a four-level decrease-"because she had considerable knowledge of the arson and her involvement in both incidents was necessary for the execution of the offense." The PSR also applied the terrorism enhancement-a twelve-level increase-due to the probation officer's conclusion that Tankersley's crime was intended to promote a federal crime of terrorism. After a three-level reduction for acceptance of responsibility, the PSR's recommended total offense level was 28.

Tankersley objected to several of the factual determinations made in the PSR. Tankersley

contested the PSR's characterization of her involvement in the conspiracy. She complained that she never identified herself as a part of either ELF or ALF and that the PSR failed to state the limited time frame during which she was involved-from autumn of 1998 to January 1999. Moreover, Tankersley disputed the PSR's failure to state that she never participated in the "Book Club" meetings of the other conspirators.[6] Tankersley also claimed that the PSR failed to include information regarding her relationship with her boyfriend, Ferguson, who she claimed greatly influenced her decision to participate in these offenses. Finally, she argued that the PSR overstates her involvement in the U.S. Forest Industries arson when compared to co-conspirator Tubbs.

In an addendum, the probation officer recognized Tankersley's objections to some of the factual characterizations made in the PSR. Nevertheless, the addendum offered no changes as the information contained within the PSR "was taken from official reports" and "does not affect the guidelines calculations."

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[6] Many of the conspirators attended and participated in "Book Club" meetings held in four different states. The Book Club was the moniker for a select sub-group of co-conspirators who set direction for the groups' criminal actions and tactics. The district court further explained in its Memorandum Opinion on sentencing issues: "Topics at the Book Club meetings included lock-picking, computer security, reconnaissance of targeted property, and the manufacture of timing devices to ignite improvised incendiary devices. The conspirators concealed their true identities by using code words and numbers, names, and nicknames, and by producing or obtaining false identification documents."

The district court held its first sentencing hearing for Tankersley on May 31, 2007. It calculated the base offense level at six, with a thirteen-level increase for the amount of loss and a two-level increase for more than minimal planning. It heard argument, took testimony, and accepted the probation officer's recommendation regarding the minimal role adjustment. The court applied a two-level downward adjustment for minor role, stating "I decline to adjust downward an additional two levels for minimal role in that when you had the choice, you went back. And that was after the device didn't ignite and you went [b]ack, and I just can't ignore that."

The district court concluded that the government failed to show by clear and convincing evidence that the U.S. Forest Industries arson was calculated to retaliate against government conduct.[7] The court noted that the communiqué issued after the arson stated that the offenders were targeting "greedy" corporations with no mention of government conduct. Nevertheless, the district court

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[7] In support of the application of the terrorism enhancement, the prosecutor presented evidence of a timber protest at the U.S. Forest Industries' headquarters approximately six months prior to the arson. The group was protesting timber harvests in Colorado. Between 80 to 85% of U.S. Forest Industries' timber harvest contracts handled out of its Colorado office were with the United States Forest Service. Nevertheless, because the offenders discussed only "corporate greed" in their communiqué, the district court did not find by clear and convincing evidence that Tankersley sought to influence government conduct. The government does not challenge this finding on appeal.

concluded that the guidelines "do not adequately take into account aggravating circumstances of the offense conduct." The district court felt that it needed to send a clear message that people will be held accountable for such "devastating" messages and actions. It concluded that the Sentencing Guidelines did not properly account for conduct directed at private individuals and/or entities.

> In some ways, I would note, it is curious that the enhancement only applies to the offense that targets government conduct. And I say that as tongue in cheek, because, of course it makes a big difference to target government, to target the very essence of how we are governed.
>
> But it also needs to be taken into account that we have to recognize using intimidation and violence against private individuals really isn't much different and really should not be in any way condoned.
>
> At the same time, I do not necessarily think that they should be treated so dramatically different, and that is why I have routinely departed so that the message, because people are concrete thinkers, oh, can't torch government but we have a pass on private property. And given the concrete thinking out there, I just want to make sure they understand, one way

> or the other, that will be recognized and dealt with.
>
> Therefore, I find that 3A1.4 does not adequately take into account the defendant's intent to frighten, intimidate, and coerce private individuals at the U.S. Forest Industries through her actions. I therefore exercise my discretion under 5K2.0 to depart upward by 12 levels....

The district court's decision to depart upward twelve levels resulted in an offense level of 31. It then granted a three-level downward adjustment for acceptance of responsibility. The government moved for an additional downward departure of four levels based on Tankersley's cooperation and substantial assistance. The court ultimately granted a five-level downward departure, balancing Tankersley's voluntary abandonment of the conspiracy and her productive life afterwards against the "incredible dangerousness of what was done and the damage and magnitude."

After the first sentencing hearing, the district court calculated Tankersley's total offense level at 23, resulting in a guidelines range of 46 to 57 months. The district court imposed a sentence of 46 months.

Tankersley promptly filed a motion to reopen her first sentencing, arguing that she had not been given adequate notice of the district court's intent to depart upward. The district court granted the motion to reopen and held a second sentencing

hearing on August 3, 2007. In addition to questioning whether the district court had the authority to depart upward, Tankersley argued that a twelve-level upward departure was unwarranted as co-conspirator Tubbs received only a one-level upward departure. She also compared her sentence to that of co-conspirator Daniel Thurston, who received a 37-month sentence.

The district court addressed each of Tankersley's arguments in the second hearing. First, it stated that its intent in each case was "to upwardly depart so that the resulting offense level was the same as if the § 3A1.4 [terrorism] enhancement applied." [8] Because the enhancement had applied to some but not all of Tubbs's convictions, the district court needed to impose only a one-level upward departure to make the offense level the same as if the enhancement had applied to all of Tubbs's convictions.[9] It reiterated its purpose in departing upward:

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[8] The district court applied only the twelve-level upward departure; it did not increase Tankersley's criminal history category to VI as provided for by the terrorism enhancement.

[9] Tubbs pled guilty to a 56-count information and received a sentence of 151 months. Tubbs's conviction stemmed from nine separate incidents of arson. During his sentencing proceedings, the district court concluded that § 3A1.4 applied to some of his convictions, but not others. It therefore exercised its discretion under U.S.S.G. § 5K2.0 to depart upward one level. The district court reasoned that § 3A1.4 "d[id] not adequately take into account the defendant's intent to frighten, intimidate, and coerce government and private individuals through his actions." The one level upward departure "result[ed] in the same offense level had the terrorism" enhancement applied to all of Tubbs's convictions.

I found that it would not be fair or reasonable if some coconspirators received a 12-level enhancement under 3A1.4 while others did not simply because they targeted the conduct of private individuals rather than government.

> I think I alluded in the colloquy I had with counsel that in the context of this particular case, I think it's an indirect and direct relationship, and that's just a factor that in attempting to be fair and provide substantially similar sentences in this particular case, I have consistently followed as an analysis. And I'm going to follow it in this case.
>
> So the purpose of the conspiracy, the means, motives, intents, and actions to carry out those purposes were the same and should be treated similarly.
>
> Upward departure, 5K2.0, again, I have the discretion to depart where the guidelines do not adequately take into account aggravating circumstances of the offense conduct. As I found before, I find that 3A1.4 does not adequately take into account the defendant's intent to frighten, intimidate, and coerce private individuals at the U.S. Forest Industries, through your actions. I exercise my discretion under 5K2.0 to depart upward by 12 levels, resulting in

> an offense level of 28, that resulting offense level that would have been applied had the enhancement in fact ... been applied.

Second, the district court addressed Tankersley's comparison of her sentence to that of her co-conspirator Thurston, who received 37 months. The court noted that the government recommended a sentence of 37 months based on Thurston's substantial assistance and that the government was in a better position than the court to assess relative cooperation among those who offered information to mitigate their punishment. Moreover, Tankersley did not receive an upward departure for participating in the writing of the U.S. Forest Industries communiqué because, while relevant to determine the offenders' intent, the communiqué did not involve conduct that formed the basis for her conviction.

When imposing its sentence, the court noted Tankersley's willingness to remove herself from this conspiracy and move her life in a positive direction. It then restated the same guidelines calculations from the first hearing, but based on the factors set forth in 18 U.S.C. § 3553(a), it departed downward an additional level, resulting in a final range of 41 to 51 months. The district court imposed a final sentence of 41 months, six months less than previously imposed.

II

We review all sentencing decisions for an abuse of discretion, regardless of whether the district

court applies a sentence inside or outside the suggested guidelines range. *United States v. Carty,* 520 F.3d 984, 993 (9th Cir. 2008) (en banc) (citing *Gall v. United States,* ··· U.S. ····, 128 S.Ct. 586, 597, 169 L.Ed.2d 445 (2007)). First, we must determine whether the district court properly calculated the applicable range under the advisory guidelines. *United States v. Mohamed,* 459 F.3d 979, 985 (9th Cir. 2006). "It [is] procedural error for a district court to fail to calculate-or to calculate incorrectly-the Guidelines range." *Carty,* 520 F.3d at 993. We review de novo the district court's interpretation of the Sentencing Guidelines, and we review for clear error the district court's determination of the facts. *United States v. Barsumyan,* 517 F.3d 1154, 1157 (9th Cir. 2008). Second, we review the sentence for substantive reasonableness. *Carty,* 520 F.3d at 993; *Mohamed,* 459 F.3d at 985, 987.

III

Tankersley contends that the district court erred by declining to apply a four-level downward adjustment for minimal role, instead applying only a two-level downward adjustment for minor role. We review for clear error the district court's determination that Tankersley does not qualify for minimal participant status. *See United States v. Johnson,* 297 F.3d 845, 874 (9th Cir. 2002). "[A] minimal participant is one who is clearly among the least culpable in a criminal group." *Id.* (citing U.S. Sentencing Guidelines Manual § 3B1.2(a), cmt. n. 1 (1998)). Tankersley's culpability is measured against her co-participants and not an "average participant." *Id.* "[A] downward adjustment under § 3B1.2(a) is appropriate only if the defendant was at least

'substantially' less culpable than his co-participants." *Id.*

"In determining whether a defendant was a minimal or a minor participant in any criminal activity, a district court ... shall consider all conduct within the scope of § 1B1.3 (Relevant Conduct), not just conduct cited in the count of conviction." *United States v. Hatley,* 15 F.3d 856, 859 (9th Cir. 1994); *see also United States v. Rojas-Millan,* 234 F.3d 464, 473 (9th Cir. 2000) ("[District] courts [need] to look beyond the individuals brought before [them] to the overall criminal scheme when determining whether a particular defendant is a minor participant in the criminal scheme."); *United States v. Demers,* 13 F.3d 1381, 1383 (9th Cir. 1994) ("[A]ll relevant conduct within the meaning of § 1B1.3 may serve as the predicate for a downward adjustment."). Section 1B1.3 includes as relevant conduct "all reasonably foreseeable acts and omissions of others in furtherance of the jointly undertaken criminal activity." U.S.S.G. § 1B1.3(a)(1)(B). This is particularly appropriate when sentencing members of a pervasive and farranging criminal enterprise. Here, the court found that the conspirators "also formed 'cells' or groups that planned and carried out each arson." The cells then built the incendiary devices, researched and identified prospective targets, and practiced "dry runs." Some conspirators acted as "lookouts" while others planted the devices and accelerants at target sites.

The district court rejected the recommendation of the parties to grant a four-level downward adjustment. It stated that

> [b]ased on the recommendations of Probation, I also find a two-level downward adjustment for minor role. I decline to adjust downward an additional two levels for minimal role. In this instance, the defendant chose to return to the U.S. [Forest] Industries after the device did not ignite to ensure that a second arson attempt was successful.

In the PSR, the probation officer explained his reasoning for recommending a two-level adjustment:

> The CW [Cooperating Witness Jacob Ferguson] planned this arson with Ms. Tankersley. The CW assembled the incendiary devices, and placed them at the target site along with Ms. Rubin. Mr. Tubbs and Ms. Tankersley were lookouts. Mr. Tubbs was only involved in the attempted arson. Ms. Tankersley was less culpable than the CW. I will recommend a minor role adjustment instead of a minimal role, because she had considerable knowledge of the arson and her involvement in both incidents were necessary for the execution of the offense.

Tankersley argues that the district court's finding was clearly erroneous on three different grounds: (1) the district court made no findings comparing Tankersley's role relative to other participants; (2) the district court failed to view Tankersley's role in relation to the overall

conspiracy; and (3) as a factual matter, Tankersley played a minimal role rather than a minor role in the offense. We reject her arguments based on our review of the record.

The district court expressly adopted the recommendation provided in the PSR, and the probation officer specifically discussed Tankersley's involvement in the offense as compared to the other participants of the U.S. Forest Industries arson. Tankersley ignores the fact that the district court conducted ten different sentencing hearings stemming from this eco-terrorism conspiracy. The court carefully examined evidence of the pervasive criminal behavior present here and found conspirators like Tankersley liable for jointly undertaken conduct by others that was reasonably foreseeable in furtherance of the overall conspiracy. *See* U.S.S.G. § 1B1.3(a)(1)(B); *United States v. Riley,* 335 F.3d 919, 928-29 (9th Cir. 2003); *United States v. Bynum,* 327 F.3d 986, 993 (9th Cir .2003); *United States v. Gamez,* 301 F.3d 1138, 1146-48 (9th Cir. 2002); *United States v. Whitecotton,* 142 F.3d 1194, 1198-99 (9th Cir. 1998). It went to great lengths to determine each co-conspirator's overall culpability and impose a fair and equitable sentence. *See Hatley,* 15 F.3d at 860 ("[I]t is clear from the record that the court did not limit the scope of the inquiry to the count of conviction."). In light of the fact that the minimal role adjustment applies only to those that are "substantially' less culpable, we can readily deduce from this record that, through this multiple sentencing process, the district court considered Tankersley's culpability in relation to each participant and imposed a fair and reasonable

sentence based on her part in the overall criminal enterprise.[10]

We find nothing in the record to suggest that the district court clearly erred by concluding that Tankersley played more than a minimal role. She had an opportunity to withdraw from the conspiracy after the first attempt to destroy U.S. Forest Industries failed. She did not withdraw, but went back again, and her participation in the second attempt was vital to its success. This particular fire caused almost one million dollars in damage and was a significant event in the overall success of the eco-terrorists' endeavors to deliver their message of intimidation and retaliation through acts directed against timber communities, tree farms, horse rendering plants, SUV dealerships, university research labs, government installations, and energy facilities. We therefore affirm the district court's

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[10] Tankersley also argues that the district court failed to resolve certain factual discrepancies in the PSR that relate to her role as a minimal participant. In addition to declining to apply a minimal role adjustment-from which we can logically infer that the district court resolved all factual discrepancies in favor of the PSR-the district court expressly adopted the recommendation of the PSR. This was sufficient for the district court to satisfy its obligation under Federal Rule of Criminal Procedure 32. *Cf. United States v. Herrera-Rojas*, 243 F.3d 1139, 1143 (9th Cir. 2001) (stating that the court failed to satisfy Rule 32 when the district court "did not mention the PSR except to make it part of the record, did not adopt its reasoning, and did not mention the objections filed by Herrera-Rojas at all"). Moreover, when the district court asked Tankersley whether she had any other corrections with regards to the PSR, Tankersley responded in the negative.

decision not to grant a four-level downward adjustment for minimal role.

IV

Tankersley next argues that the district court's imposition of a twelve-level upward departure, based solely on the court's policy disagreement with the Sentencing Guidelines, renders the sentence unreasonable. We disagree. The Supreme Court in *Kimbrough v. United States*, --- U.S. ----, 128 S.Ct. 558, 169 L.Ed.2d 481 (2007), recently concluded that a "sentence outside the guidelines range is [not] per se unreasonable when it is based on a disagreement with the sentencing disparity for crack and powder cocaine offenses." *Id.* at 564, 128 S.Ct. 558 (internal quotation marks and alteration omitted). The Court reiterated that the Sentencing Guidelines "are advisory only," and therefore, a conclusion that a sentence was unreasonable solely because it was based on a disagreement with sentencing policy would render the Sentencing Guidelines "effectively mandatory." *Id.*

Tankersley tries to distinguish her case from *Kimbrough*, arguing that, in applying the twelve-level departure, the district court rejected a policy position mandated by Congress, not by the Sentencing Commission. *Cf. Kimbrough*, 128 S.Ct. at 570-574 (rejecting the argument that the 100-to-1 ratio was a "specific policy determinatio[n] that Congress has directed sentencing courts to observe" (alteration in original; internal quotation marks omitted)); *see also United States v. Gomez-Herrera*, 523 F.3d 554, 559 (5th Cir. 2008) (" *Kimbrough*...

concerned a district court's ability to sentence in disagreement with Guideline policy, ... [not] a district court's ability to sentence in disagreement with Congressional policy."). Her arguments are based on language found in the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). *See* Pub. L. No. 104-132, § 730. As a part of AEDPA, Congress directed the Sentencing Commission to amend § 3A1.4 so that it applies only to "federal crimes of terrorism" as defined in 18 U.S.C. § 2332b(g). *Id.*

Previously, the enhancement had applied only to a felony that "involves or is intended to promote international terrorism." Violent Crime Control and Enforcement Act of 1994, Pub. L. No. 103-322 § 120004 (1994).

The district court rejected Tankersley's argument, reasoning that "AEDPA's directive that § 3A1.4 apply 'only to federal crimes of terrorism' could be construed as requiring the replacement of the term 'international terrorism' with the term 'federal crime of terrorism'-just as the Sentencing Commission did." In other words, Congress did not specify through AEDPA that a district court could not upwardly depart for anything other than a "federal crime of terrorism," and nothing in AEDPA prohibits the Sentencing Commission from expanding the definition, or including a comparable sentencing enhancement, for similar terrorist acts directed at private conduct.

On appeal Tankersley cites legislative history in an effort to undermine the district court's reasoning. Tankersley acknowledges that by

changing "international terrorism" to "federal crimes of terrorism" Congress sought to broaden the enhancement's application to domestic terrorism. *See* Deborah F. Buckman, Annotation, *Construction and Application of Federal Domestic Terrorism Sentencing Enhancement, U.S.S.G. § 3A1.4,* 186 A.L.R. Fed. 147,§ 2(a) (2003). Nevertheless, in doing so Tankersley argues that Congress simultaneously created a narrow definition of terrorism " 'in order to keep a sentencing judge from assigning a terrorist label to crimes that are truly not terrorist, and to adequately punish the terrorist for his offense.' " *Id.* (quoting H.R. Rep. No. 104-383, at 114 (1995)); *see also* H.R. Rep. No. 104-518, at 123 (1996) (Conf. Rep.), *reprinted in* 1996 U.S.C.C.A.N. 944, 956 ("This section of the bill will make that new provision applicable only to those specifically listed federal crimes of terrorism, upon conviction of those crimes with the necessary motivational element to be established at the sentencing phase of the prosecution...."); *Graham,* 275 F.3d at 524-543 (Cohn, J., dissenting) (setting forth the legislative history of U.S.S.G. § 3A1.4).

In reviewing the legislative history of § 3A1.4, two things are clear, (1) Congress wanted to limit the application of the terrorism enhancement to only those crimes that involved or intended to promote a crime enumerated in § 2332b(g)(5)(B), and (2) Congress wanted to include an element of intent. The Conference Report on Senate Bill 735-the final form of the bill enacted into AEDPA-stated:

> This section gives the U.S. Sentencing Commission amendment authority to expand the scope of its

> Chapter 3 enhancement for "international terrorism offenses" under the U.S. Sentencing Guidelines, to apply only to federal crimes of terrorism as defined in section 2332b(g). In amendments to the Sentencing Guidelines that became effective November 1, 1996, a new provision that substantially increases jail time for offenses committed in connection with a crime of international terrorism. This section of the bill will make that new provision applicable only to those specifically listed federal crimes of terrorism, upon conviction of those crimes with the necessary motivational element to be established at the sentencing phase of the prosecution, without having to wait until November 1996 for the change to become law.

H.R.Rep. No. 104-518, at 956 (1996) (Conf.Rep.).

Based on this legislative history, we conclude that through the terrorism enhancement Congress wanted to impose a harsher punishment on any individual who committed an offense that involved or intended to promote one of the enumerated terrorist acts, and intended, through that offense, to influence the conduct of others. Nowhere in the legislative history do we find evidence of congressional intent to prohibit the Sentencing Commission from promulgating a guideline that enhanced an offender's sentence based on that offender's intent to use terrorist activities to influence *private* conduct. *Cf. United States v.*

Rodriguez, 527 F.3d 221, 229 (1st Cir. 2008) (noting that nothing in the PROTECT Act "forbids nor discourages the use of a particular sentencing rationale, and it says nothing about a district court's discretion to deviate from the guidelines based on a fast-track disparity"). We therefore hold that the district court's decision to depart-based on its desire to punish terrorist activities directed at private conduct in a manner similar to how it punished terrorist activities direct at government conduct-did not render Tankersley's sentence per se unreasonable.

V

Tankersley also challenges the upward departure as being unwarranted under § 5K2.0 because there were no aggravating circumstances that were not adequately taken into consideration by the Sentencing Commission and because there was no evidence of harm sufficient to remove Tankersley's offense from the heartland of arson offenses. After *Booker*, the scheme of downward and upward departures has been replaced by the requirement that judges impose a reasonable sentence. *Mohamed*, 459 F.3d at 986. Where, as here, a district court frames its analysis in terms of a downward or upward departure, we treat the "so-called departure[ ] as an exercise of post-*Booker* discretion to sentence a defendant outside of the applicable guidelines range," and "any post-*Booker* decision to sentence outside of the applicable guidelines range is subject to a unitary review for reasonableness, no matter how the district court styles its sentencing decision." *Id.* at 987.

The old departure scheme is relevant today only insofar as factors that might have supported (or not supported) a departure may tend to show that a non-guidelines sentence is (or is not) reasonable. *Id.* "[It] reflected the Sentencing Commission's judgment about what types of considerations should or should not take a case out of the 'heartland of typical cases' such that an extra-guidelines sentence would be justified." *Id.* (quoting *Koon v. United States,* 518 U.S. 81, 94, 116 S. Ct. 2035, 135 L.Ed.2d 392 (1996)).[11]

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[11] We are unpersuaded by Tankersley's argument that the Supreme Court's decision in *Irizarry v. United States,* -- U.S. --, 128 S.Ct. 2198, 171 L.Ed.2d 28 (2008), and our subsequent decision in *United States v. Evans-Martinez,* 530 F.3d 1164 (9th Cir. 2008), have somehow undermined our reasoning in *Mohamed. Mohamed* discusses our approach to reviewing post-*Booker* sentences. 459 F.3d at 984. In *Irizarry,* the Supreme Court held that the notice requirement in Federal Rule of Criminal Procedure 32(h) did not apply to a district court's decision to vary from the guideline range under 18 U.S.C. § 3553(a). --- U.S. ----, 128 S.Ct. 2198, 2202-04, 171 L.Ed.2d 28. In *Evans-Martinez,* we held that, post-*Booker,* a district court is still required under Rule 32(h) to provide notice of its intent to "depart" from the guideline range. 530 F.3d 1164, 1168.Neither decision affects how we will review the substance of a post-*Booker* sentence for reasonableness. They address only the level of notice due to a defendant prior to a court's decision to sentence outside a suggested guideline range. As we stated in *Mohamed,* the district court does not have to ignore the pre-*Booker* system of departures. 459 F.3d at 987. *Evans-Martinez* requires the district court to notify the defendant when it plans on citing a departure provision to support its sentencing decision, but *Evans-Martinez* does not change how we, as an appellate court, will review for reasonableness a non-guidelines sentence. Because the district court granted Tankersley's motion and held a second sentencing hearing, she had all the notice we required in *Evans-Martinez* of the district court's intent to sentence her on the grounds we now uphold.

In other words, we do not need to consider whether the district court correctly applied the departure provision in § 5K2.0; rather we review the district court's deviation from the applicable guidelines range for reasonableness. *Id.* at 989; *see also United States v. Johnson*, 427 F.3d 423, 425-27 (7th Cir. 2005) (reviewing the entire sentence for reasonableness rather than determining whether the district court correctly applied U.S.S.G. § 4A1.3).

VI

We next consider whether Tankersley's 41-month sentence is reasonable. The district court must "examine[ ] the final advisory sentencing range dictated by the Guidelines in light of all relevant § 3553(a) factors and 'the particular circumstances of [the defendant]'s case.' " *Barsumyan*, 517 F.3d at 1159 (alteration in original) (quoting *Kimbrough*, 128 S.Ct. at 576).[12] The district court is charged with

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Irizarry certainly requires no more, and, as discussed below, the ultimate sentence is reasonable under *Mohamed*.

[12] In *Barsumyan*, we stated that a policy-based deviation from the Sentencing Guidelines must come after the court has calculated and examined the final advisory sentencing range. 517 F.3d at 1158-59. Our concern in *Barsumyan* was the defendant's suggestion that we should "perform a sort of mini-*Booker* reasonableness determination at each step in determining the Sentencing Guidelines offense level." *Id.* at 1158. Here, unlike the situations presented in either *Barsumyan* or *Kimbrough*, the district court cited its departure authority under U.S.S.G. § 5K2.0, rather than 18 U.S.C. § 3553(a), when making its policy-based departure. It therefore necessarily made its policy-based decision while in the process of calculating Tankersley's advisory guidelines range.

the responsibility of imposing a sentence that is "sufficient, but not greater than necessary." *Carty*, 520 F.3d at 991 (quoting 18 U.S.C. § 3553(a)). In doing so, the district court was understandably concerned by the gravity of the criminal conduct with which it was confronted in these cases.

During both sentencing hearings for Tankersley, the district court discussed several of the § 3553(a) factors, including the nature and circumstance of the offense, § 3553(a)(1), the need for "adequate deterrence to criminal conduct," § 3553(a)(2)(B), as well as "the need to avoid unwarranted sentence disparities,"§ 3553(a)(6). The court concluded that the communiqué issued after the U.S. Forest Industries arson conveyed "a devastating message." Tankersley herself and the enterprise as a whole spent a substantial amount of time promoting these types of activities and injecting fear into governmental and private entities. As such, the court found compelling the need to deter. It reasoned that "down the road, people need to know, when these messages and actions are taken, they will be held accountable."

Additionally, the district court concluded that Tankersley's intent to influence private individuals

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Nevertheless, the procedural difference between Tankersley's sentencing and the one contemplated by *Barsumyan* is of no consequence because, as we stated in *Mohamed*, we will treat an upward departure "as an exercise of post-*Booker* discretion to sentence a defendant outside of the applicable guidelines range." 459 F.3d at 987. We therefore review the whole sentence for reasonableness.

through intimidation and violence separated her offense from mine-run arson cases. It found that Tankersley's "intent to frighten, intimidate, and coerce private individuals" warranted a greater sentence. The court also sought to avoid unwarranted sentence disparities with defendants for whom the terrorism enhancement applied, given its conclusion that terrorist activities directed at private individuals should not be treated differently than terrorist activities directed at government conduct.

We find unavailing Tankersley's citation to *United States v. Abu Ali*, 528 F.3d 210 (4th Cir. 2008), to support her argument that the district court improperly relied on the need to avoid sentence disparities to support its departure. In *Abu Ali*, the Fourth Circuit determined that the district court erred when it significantly relied on the need to avoid an unwarranted sentence disparity between the defendant, a person affiliated with an al-Queda terrorist cell that planned to carry out a number of terrorist acts in the United States, and Jon Walker Lindh, Timothy McVeigh, and Terry Nichols. *Id.* at 262-66. Unlike in *Abu Ali*, the district court here considered the sentences of co-defendants who participated in the same conspiracy for the same purposes.[13] *Cf. id.* at 262-63. Additionally, each of

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[13] Each co-conspirator admitted that

> [t]he primary purposes of the conspiracy were to influence and affect the conduct of government, commerce, private business and others in the civilian population by means of force, violence, sabotage, destruction of property, intimidation and coercion, and by

the co-defendants was similarly situated in that they had entered plea agreements and had accepted responsibility. Such comparison of co-defendants led the district court to conclude that, given the objectives of the criminal conspiracy, those co-defendants for whom the terrorism enhancement did not directly apply should not be treated differently from those co-defendants for whom the terrorism enhancement was applicable.

After concluding that the nature and circumstance of Tankersley's offense warranted a departure above the advisory guidelines range, the district court next considered Tankersley's mitigating circumstances. Among other things, the court considered Tankersley's subsequent behavior, her voluntary withdrawal from the conspiracy, her school work, her community-based work, and her expressed remorse. During the first sentencing hearing the district court concluded that these mitigating factors warranted a downward departure of five levels. However, the district court reconsidered its analysis, and after considering all of the same mitigating factors during the second sentencing hearing, the district court departed downward six-levels (an additional two levels beyond

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similar means to retaliate against the conduct of government, commerce and private business. To achieve these purposes, some of the conspirators committed and attempted to commit acts potentially dangerous to human life and property that constituted violations of the criminal laws of the United States and of individual states.

the government's recommendation). This resulted in a guidelines range of 41 to 51 months, for which the court imposed a sentence of 41 months.

The district court sentenced ten individuals involved in this conspiracy. It carefully reviewed Tankersley's PSR, the parties' submissions, listened to testimony, and held two lengthy sentencing hearings for Tankersley alone. The district court fully considered Tankersley's subsequent behavior, and the court's expectations that Tankersley, once having completed her sentence, will hopefully lead a productive, crime-free life. Nevertheless, the district court could not ignore the grave nature and aggravated circumstances of Tankersley's offense, the enormous destruction it caused, and the intent to harm and intimidate entire communities. The district court's sentence was well-reasoned and properly based on the § 3553(a) factors. We therefore conclude Tankersley's 41-month sentence is reasonable.

VII

For the foregoing reasons, we hold that a sentence outside the applicable advisory guidelines range is not per se unreasonable when it is based on the district court's efforts to achieve sentencing parity between co-defendants who engaged in similar conduct, where some defendants were properly subject to a sentencing enhancement, and others were not.

AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

NO. 06-CR-60071

UNITED STATES OF AMERICA

PLAINTIFF,

V.

KENDALL TANKERSLEY,

DEFENDANT.

TRANSCRIPT OF PORTION OF PROCEEDINGS
BEFORE THE HONORABLE ANN AIKEN
UNITED STATES DISTRICT COURT JUDGE

August 3, 2007

THE CLERK: This is the time set for Criminal 06-60071, United States of America versus Kendall Tankersley, imposition of sentence.

. . .

THE COURT: The court agreed to reopen the defendant's sentencing for the purpose of allowing the defendant the opportunity to present argument

that a 12-level upward departure was not appropriate.

Having given Ms. Tankersley that opportunity, I'm going to address the arguments as follows: Essentially, the way I read it, you maintain that the sentence of 46 months is disproportionately severe when compared with the sentences received by other coconspirators. You also assert that other defendants received a greater reduction from the government's recommended sentence than Ms. Tankersley, even those who refused to cooperate fully with the government.

Further, you rely on the fact that other defendants, including those who were convicted of offenses that were subject to the terrorism enhancement under 3A1.4 were given greater reductions in their sentences. And that the suggestion is by the defendant that an upward departure is not warranted in this case at all.

So after reviewing your presentence report, the sentencing memorandum prior to the sentencing hearing, I decided, as I did in every other coconspirator's case, that I would upwardly depart to the offense level that would have applied if the offenses of conviction had qualified for the 3A1.4 enhancement.

Indeed, I found that it would not be fair or reasonable if some coconspirators received a 12-level enhancement under 3A1.4 while others did not simply because they targeted the conduct of private individuals rather than government.

I think I alluded in the colloquy I had with counsel that in the context of this particular case, I think it's an indirect and direct relationship, and that's just a factor that in attempting to be fair and provide substantially similar sentences in this particular case, I have consistently followed as an analysis. And I'm going to follow it in this case.

So the purposes of the conspiracy, the means, motives, intents, and actions to carry out those purposes were the same and should be treated similarly. At the same time, I have looked at each individual case to determine the level of downward departure, if any. And I have done that as appropriate again, in each particular case.

Further, I have not departed downward more than two levels in any case, even those defendants who provided assistance to the government at great cost to them personally.

For those defendants whose offense levels were significantly greater, such as Mr. Meyerhoff, Mr. Tubbs, and Ms. Gerlach, a departure of one or two levels resulted in a proportionately larger reduction in sentence than for a defendant with a lower offense level, such as Ms. Tankersley. The departure reflected the proportionality that is recognized by the guidelines.

As the defendant points out that other defendants, such as Mr. Tubbs, received only one level upward departure, I explained the reasoning behind this decision at Mr. Paul's sentencing on Wednesday, however, for the benefit of defense counsel who were not present, I do so again, or for those who have heard it before, please bear with me.

My intent in Mr. Tubbs' case, as in all of these cases, was to upwardly depart so that the resulting offense level was the same as if the 3A1.4 enhancement had applied. In Mr. Tubbs' case, I found that the enhancement applied to some offenses but not to others, including Cavel West, and applied the 12-level enhancement to each qualifying offense as a Chapter 3 adjustment under the guidelines. I did not impose the 5K2.0 upward departure to each of the nonqualifying offenses at the same stage of the guideline calculations because the upward, and I might add the downward, departures are Chapter 5 adjustments that are intended to be imposed at the final stages of the guidelines calculations.

Proceeding with the calculations, I determined the multiple count adjustment for Mr. Tubbs' offenses under Guideline 3D1.4, also a Chapter 3 adjustment, which provides a framework for determining the combined offense level for multiple counts. Under that framework, the multiple count adjustment is determined by taking the highest offense level of an offense group and increasing it by a specified amount. In Mr. Tubbs' case, the highest grouped offense was 35, reflecting the 12-level enhancement I imposed for Mr. Tubbs' qualifying offenses under Section 3A1.4. The offense levels of the remaining groups totaled four units. And under 3D1.4, I was required to increase the offense level by 4, resulting in a combined offense level of 39.

Had I imposed the 12-level upward departure to Mr. Tubbs' offenses that did not qualify under 3A1.4 at the Chapter 3 stage of the guidelines calculations, including the arsons of Cavel West, Childers Meat Company, Superior Lumber, U.S. Forest Industries, and the Burns Wild Horse Corral,

the grouped offenses with the highest offense level would have remained 35, but the offense levels of the remaining groups would have totaled 8 units, requiring the court to increase Mr. Tubbs' offense level by 5, resulting in an offense level of 40.

However, because an upward departure under 5K2.0 occurs at the end of the calculations, I imposed a collective upward departure in Mr. Tubbs' case accordingly. I did not upward depart 12 levels, because to do so would have increased Mr. Tubbs' offense level 11 levels beyond what would have resulted in the 3A1.4 enhancement if it had applied to all of his offenses of conviction.

Again, my intent in Mr. Tubbs' case, as in all the cases, was to upward depart to the offense level that would have resulted if the 3A1.4 enhancement had applied. Therefore, I departed upward by one level to reach offense level 40. The offense level calculations would have been the same had I applied the upward departure to each of Mr. Tubbs' nonqualifying offenses at the Chapter 3 stage of the calculations.

Now, unlike Mr. Tubbs, Ms. Tankersley is not subject to a multiple count adjustment under Guideline 3D1. Therefore, to attain the offense level that would have applied under a 3A1.4 enhancement, I upward depart by 12 levels, as I did in several other coconspirators' sentencings, thus I am not treating Ms. Tankersley more severely than Mr. Tubbs or any other coconspirator. In fact, I am treating them the same.

Ms. Tankersley also compares her case to Mr. Thurston who received a 37-month sentence. Notably, the government's motion for substantial assistance recommended a sentence of 37 months, and I did not depart lower than the recommendation, unlike in Ms. Tankersley's case. And I think it goes without saying, I'm going -- an aside, Mr. Ray, I think, has placed on the record an evaluation of the decisions that really are part and parcel with this entire set of ten defendants, and that is, they made an individual determination based on quality and quantity of information provided by a particular defendant. And the choice to even have those discussions, and accordingly made their recommendations to counsel to resolve the particular case within a range afforded them in a plea agreement, and as such, as I told you earlier, oftentimes, the respective attorneys representing the individual parties know a great deal more about the case and have made evaluations and professional determinations about what convictions and what risks they have in pursuing legal theories and issues, and they make their plea agreements out of a professional evaluation of that information and those judgment calls. And as such, I only know that it was a strong recommendation and a strong statement today that Mr. Thurston cooperated over and above what the government might have hoped for. And they, accordingly, granted him that negotiation at the time of his change of plea. So I have considered him apples and oranges, and I have had a difficult time in terms of fashioning across-the-board proportionality because I do think his sticks out, but I think the government today has under-scored why and to what degree that that decision was made to make that recommendation. So as with other

defendants who did not receive an enhancement under 3A1.4, I upwardly departed by 12 levels in Mr. Thurston's case based on his intent in targeting the BLM Litchfield Wild Horse Corral for arson.

So I think in listening to your argument, you also complained that Mr. Thurston did not receive a further upward departure for participating in the U.S. Forest Industries communiqué issued after the arson. However, the 12-level upward departure was not based on the conduct of composing this communiqué. It was based on the conduct of committing the arson.

The communiqué is relevant to the extent that it reflects the motives and intent of the arsonists who include Ms. Tankersley. Moreover, I did not impose an upward departure in any case based on conduct that did not form the offenses of conviction, and that includes Ms. Tankersley's uncharged conduct. Thus, today, I think the real issue is whether the 46-month sentence is reasonable but not greater than necessary in light of all the facts of this case. And I find that for the reasons I gave at the initial sentencing, that I stated on the record, as well as taking a look at this case in the context of the defendant's cooperation, her substantial withdrawal from the activities, her efforts to become a productive and contributing member of society, her substantial step towards making amends with the victim in this case, and, again, when I look back and I collectively and individually look at each of these cases, across the board, am I satisfied that it's a fair and reasonable sentence under all those circumstances, and taking into account each individual defendant's comments, statements, past

actions, changes in behavior, going forward, the goals of sentencing, be it punishment, deterrence, rehabilitation, community safety? So I don't impose these sentences lightly or without a heavy heart. It is heartbreaking that so many young and talented and intelligent people will spend years of their lives, some significantly more than others, behind bars. But the defendants, including Ms. Tankersley, made choices and must bear the consequences of their actions.

And like a number of the defendants in this particular case, I frankly fully expect Ms. Tankersley to be not only a contributing member while serving her sentence, and bettering herself, because she certainly has skills and talents and capabilities that far exceed individuals, but that she can give back in those institutions the opportunities that so many people in a position -- you're in a position that other people would just cherish the opportunity to have and to go forward in life. And in so many ways, as I said earlier in Mr. Paul's sentencing, if they had just part of what you have been given, a loving family, an education, substantial economic wherewithal, the opportunities you've been afforded, many of the people that I see here on a daily basis just wouldn't be in the courtroom. And some are more resilient than others under the worst of circumstances, and some who have everything, have no resiliency, and we see them over and over again. So I expect, frankly, big things from you.

I don't think I'll see you again in the courtroom. And I think I will hear positive comments about you while you serve your sentence. And I suspect when you come out and are on court supervision that you will be successful, and you will

go on and make a huge contribution to society. I just fully expect that. Just as I looked at a number of these people who appear before me, and I suspect they still haven't learned some lessons, and they will, no doubt, be back in front of another authority figure. It may not be this court. It may be somebody else, but I fully expect them to struggle with decisions they need to make. So, accordingly, I find the following guidelines calculations apply to this offense: In Case Number 06-60071, count 1 through count 3, conspiracy, arson, and attempted arson of the U.S. Forest Industries, pursuant to Guideline 3D1.2, count 1 through 3 are grouped together for purposes of sentencing. The base offense level for this offense is 6, with a 13-level upward adjustment for amount of loss, and 2-level upward adjustment for more than minimal planning. Based on the recommendations of Probation, I also find a two-level downward adjustment for minor role. I decline to adjust downward an additional two levels for minimal role. In this instance, the defendant chose to return to the U.S. Industries after the device did not ignite to ensure that a second arson attempt was successful.

And I want to note and underscore the – there by the grace of a decision-making, had the government chosen to charge you differently, or to pursue an incendiary device, this would be a very different sentencing. So that's just a factor I take into account in terms of all the factors in placing you where you need to be in this particular calculation.

So as I found previously, I do not find the government has established the offense was calculated to retaliate against government conduct, therefore, the base offense level is 19.

Now, on the issue of acceptance of responsibility, the agreement of the parties, you will receive the three-level downward adjustment for acceptance of responsibility, resulting in a total offense level of 16. You have no criminal history points, that means your Criminal History Category is I.

Upward departure, 5K2.0, again, I have the discretion to depart where the guidelines do not adequately take into account aggravating circumstances of the offense conduct. As I found before, I find that 3A1.4 does not adequately take into account the defendant's intent to frighten, intimidate, and coerce private individuals at the U.S. Forest Industries, through your actions. I exercise my discretion under 5K2.0 to depart upward by 12 levels, resulting in an offense level of 28, that resulting offense level that would have been applied had the enhancement in fact --terrorism enhancement been applied. Resulting guidelines range based on an offense level of 28 and a Criminal History Category of I is 78 to 97 months.

And, Mr. Ray, your motion.

MR. RAY: Consistent with the government's motion at the previous sentencing hearings, we would move for a downward departure for substantial assistance of four levels.

THE COURT: And as I indicated again, I have the - as I have in all the cases, I have the discretion to increase the departure for substantial assistance or depart downward for reasons not taken into account by the guidelines. And I've articulated some of those, and I would note as follows, and I've

stated them before, I'll just highlight that you have rendered extraordinary cooperation with the government. You were timely. You were truthful. And I also want to acknowledge that you did remove yourself from the prior criminal conduct because you became aware of the consequences, the very, very serious consequences of your actions. And you have taken enormous steps to walk a productive and positive direction with tremendous commitment and success to making a difference through the health care field. And I think that's to be noted. And I think that is a clear goal is to deter future behavior, to provide safety in the community, to give you a hope through the form of rehabilitation, and the opportunity to make a difference. And then the accountability factor is there, and you are going to be held accountable for your actions.

And, again, Ms. Tankersley, it's -- it -- it's so hard, you know, when I know the Ninth Circuit, when an appellate court looks at a sentencing record, there is no question it is a paper record. And to the extent we go through all the calculations and we think we can by rule and by mathematics change people's behavior, the Congress has determined there will be guidelines, and we will make those calculations, and the Supreme Court has dictated that those calculations will be made, and that we will, in the framework of trying to provide reasonable, yet not greater than necessary, sentences, and that they be fair whether you are sentenced in Vermont, West Virginia, Montana, or Oregon, to the best of the ability of the federal judiciary, we try very hard to do the calculations and meet those expectations that, I would tell you, are

moving targets. And so we've worked hard, I think, to try to do that.

But I would tell you the factors in 3553 that we've articulated, nature and circumstances of this offense, your own criminal history characteristics, poor decision-making, judgment, all those factors as a young person that you, I know, wish you could take back today, the goals of sentencing which I articulated, and then other factors in this case that really give the court a chance to make a decision, and that is, I've really watched and looked and tried to understand each one of you as you come before me in the context of how did -- you know, how did this really work? None of us will ever truly understand what swept everybody into thinking this is the way to go, this was the way to create a change, this was the way to strike back and be heard, but it strikes me that in this particular instance, you are entitled to two levels -- an additional two levels, and I'm going to give you those two levels as an opportunity for you to understand that in the context of all this, that's where I see you fitting in. I've struggled with that. I think you and Ms. Savoie are very, very close, yet different. And I struggled, when I sentenced you, between trying to do justice to you and Ms. Savoie, and everyone else, but more clearly tried to balance that out.

But I think on -- the best way I can tell you, when you sit down and taking -- going so far over here, when I sat yesterday for four hours in our drug court, which is really a post-prison supervision program for people coming out, and it's the opportunity to see how we can help people come back in and make a difference, and what is needed, and what's necessary, and who's likely to come back and

be successful? I take all that into account in looking at where you are all going to end up at some point, and that is back in the community and moving forward.

I want you to be one of the people that we can turn to in this system and say, you know, I can live with the fact I was held accountable, because I did make bad decisions. I did apologize. And I made good on the -- to the best of my ability -- on restitution.

That's important in coming to a point of acceptance and of forgiveness of yourself and your ability to have somebody else forgive you. And, finally, for the rest of your days, as I told Mr. Paul, the legacy that he has today, that all that he did that didn't even get counted, he left a legacy of disaster and destruction.

You are not -- you have some of that, so you have a lot to make up on a go-forward basis. And I believe you, along with a number of the defendants that I've sentenced in this case, will, in fact, do that. So to the extent that there is a motivation and an incentive for you to do that, I hope today gives you that. I also hope it gives you some closure. And you can go forward and move beyond this particular point in your life.

So I depart downward two levels for a final offense level of 22, with an applicable guidelines range, then, of 41 to 51 months. So I've got to pull my -- calculate all these additional 3553 factors.

So with regard to count 1, you're committed to the Bureau of Prisons for confinement for a period of 41 months. With regard to counts 2 and 3, you are

committed to the Bureau of Prisons for confinement for a period of 41 months, to be served concurrently with the sentences imposed on count 1 and each other.

...

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

NO. 06-CR-60071

UNITED STATES OF AMERICA

PLAINTIFF,

V.

KENDALL TANKERSLEY,

DEFENDANT.

TRANSCRIPT OF PORTION OF PROCEEDINGS
BEFORE THE HONORABLE ANN AIKEN
UNITED STATES DISTRICT COURT JUDGE

May 31, 2007

COURT: Good afternoon. Please be seated.

THE CLERK: This is the time set for Criminal 06-60071, United States of America versus Kendall Tankersley, imposition of sentence.

. . .

THE COURT: You know, this job was really easier with guidelines as a mandatory calculation and imposition because you really didn't have to think about people. But we filled every prison and built more because a grid and numbers and calculations don't really look at what the goals of sentencing are, punishment, deterrence, rehabilitation, and community safety. They may help to even out differences that can be found in how a community approaches a crime.

And I remember when they were debated in the state system, stealing a bike in Eugene, Oregon, was very different than stealing a bike out in Baker. Didn't really much matter out in Baker. Taking a cow out in Baker mattered, but it didn't matter so much in Eugene. So that's how it was talked about, to balance things out.

So when the -- sort of the guard goes down, when you have to really look at human beings, it's a different process. And what I will tell you, whether it's the Tenth Circuit or the Ninth Circuit, they are all people. And we may approach it in a different way, but it's still an evolving process. And it's evolving because we are all looked at as to whether or not we are balancing the dynamics of what a sentence is to accomplish. And that requires trying to figure out how to give meaning to certain factors and how to address disparity, both in and among the individuals in this conspiracy and in and among cases that are similar.

So I sit and I listen as hard as I possibly can to find both the similarities and the differences so that I can fashion a sentence that is best tailored to

reflect both the balance for need for community safety and the message that needs to be understood over against you as an individual to give you what I truly believe is our obligation, to give you hope that you can come out and be a productive, if not a hugely successful human being in society.

And by "hugely successful," doesn't matter to me whether you have the label doctor or hospice worker. Caring for others is really what it's all about. What opportunities you will have will be of your own making. And you may not get certified and this may limit some choices, but it shouldn't define who you want to become.

So I listen very carefully, and it's sometimes not obvious, if you haven't been here each and every day, how it pieces together. But I can only say that I had the privilege of attending a sentencing seminar with the – at the presentation made by Justice Kennedy, and then we had the additional benefit of Justice Breyer attending, and so it was a twosome. And basically the message they gave the judges in that conference was, just do the right thing. You know, earn some credibility for doing the right thing, and maybe perhaps people will understand that there aren't any perfect answers in a sentencing. The best answer is what you do each and every day when you walk out of here. And I would really like to see people come back and say, this is how I changed my life and what I did to make the world better, rather than reappearing in front of me and saying, hi, Judge, remember me. You had me in juvenile court. Now I'm here in federal court. And that's happened. I don't take any pride in that. I just work a little

differently and harder to try to figure out how to make a difference in that person's life.

So what I will tell you is I consider it beyond public service, beyond an honor to be sitting here and doing the best I can at balancing those factors and having you walk out of here knowing that, you know, you are going to pay your time and you are going to do it honorably. You are going to learn from this experience. And you are going to go forward and contribute, period. And if you walk out of here with your head up, you are going to do exactly what Eleanor Roosevelt said we should do every single day. Do something every day that scares you or is hard for you or is something you have to face that you can't face. I would strongly suggest that had you done that a long time ago, you wouldn't be here today.

What I have e-mailed one of my law clerks in Portland is this is -- she happens to be coming down tomorrow because she's going to work with law students as we get our new batch of externs, because I do believe in the future, and I believe that you have to give back to help people see that they don't have to make all the same mistakes or do it the hard way. And I said, please come by.

Today has been a hard day, because I have watched squandered talent. Loss of potential. Those are hard days. Every single person in this room feels that. Everybody wishes we could fix it. That we could go back and say, are you kidding me? What the heck were you thinking? When you had the chance to walk away, you went back? Are you kidding me?

You are smart. What were you thinking? Every single person in this room would sit there and say, you are hanging out with who? Your mom saw red flags everywhere. You know, parents sometimes think, well, you know, they have to experience things and don't intervene or intervene and then drive kids away. I mean, you never know the right answer as a parent. So your mom is back there struggling with what would have been or what was the right thing and when did I mess up. She didn't mess up. She gave you what I said earlier this morning, roots and wings, and you had everything and every opportunity. And you made bad choices, and I know you wish you could take them back. So today is really -- it's a sad day.

At the same time, I -- I hope you could – could hear the emotion from a dignified, long-standing, hard working person who built up what he had, probably from the bottom up, and took pride, I would suggest, in putting food on the table of a lot of families. Now, you may not agree with his -- the way he did it, but you know what? Not your decision. That was his decision. He gets to make that in this world. And if you don't like it, you go to the legislature. You vote. You do representative democracy. You change things. You don't torch his business in the night. You don't do that. And I think I said it earlier. Way to go. They are more resolved than ever. Violence never gets a conversation started. It ends a conversation.

So in many ways, I was tremendously moved by his willingness to come here. I'm sorry he didn't stay. I think he needed to hear you say what you had to say, because in so many ways, this process

has been hard on absolutely everybody because it's taken so long to figure it out because you guys were clever and smart, and you used your clever, smart skills to hide everything, the whole gang of you, and it took a long time. And it took somebody having a conscience or getting caught, it always does, and then it unravels.

And so it took a long time, and so that's why your lawyer talked about the delay, because in many ways you are a different person. But that doesn't mean you can't be held accountable for the actions that were taken, and you know that. I know you are well prepared for today, and I know that you came here ready to accept responsibility. And that's important, because I think so many people come in here still kicking and screaming even though they have entered a guilty plea and their remorse just doesn't -- it's not genuine and it isn't -- it isn't felt. I think everyone felt yours today, and that's a big deal.

You know, I think you hit the nail on the head. You know, I have tried really hard to come up with something to talk to each of you about, because I don't want – these sentencings have be -- became dehumanized. We weren't talking about people. We were talking about numbers. And when you do that, people lose respect, I think, and in many ways, a sentencing is about personal accountability, because I'm going to be around when you come out, and I will be paying attention. I have a funny way of remembering people. And it will matter to me to see what and how you perform. And by "perform," I mean what your choices are and how you are going

to move forward in your life and where you are going to go. That matters.

And it matters enough to me to tell you that yesterday at our drug court, I have a young man who is probably one of the most gifted people I have seen academically in a while. He's been sentenced, fast-track sentenced for identity theft, incredibly complex computer problems and issues that he was really good at when he was particularly high. And so he is going to start serving a two-year sentence when he gets his grades from LCC, and he will later in June. And I made him come to drug court because I have said, well, when you are done, I'm going to have you apply to drug court because I'm going to keep my eye on you because you are only going to be in there for two years.

And what has been interesting is not only has he turned a corner before he's going into prison, he's turned a corner and he's stepped up -- he's helping move people who don't have a place to live, drug court members who are getting evicted. He is going to make sure one of them completes her community service hours so she doesn't have to serve jail time if she doesn't get it done, and he's going back to a middle -- or a high school freshman class to sort of debrief with them and underscore, before they go off on summer vacation, how, when you make bad choices, it limits your options.

And that's kind of the message I have been left with. When you make bad choices, you limit your options. It used to be, and I said this this morning, it used to be we could talk to people about their dreams. Now we just try to talk about not

limiting their options. I really want to be in a country that offers those dreams as opposed to talking about limiting options. But at the moment, I sort of feel like that's the best message I can give to kids who certainly didn't have the privilege or the opportunities that you had.

So I think it's actually changed his life to be with people who are truly grateful for any extension of kindness. And I suspect, when you serve your time in custody, that if you are respectful and if you appreciate that everybody's coming in there with a different set of fears or anger or frustration or loss and you are able to reach out to people, you can make a big difference in how people leave the prison and choose to come back into the community. It's sort of like in my life, I used to do divorce work, until I married twice as many people as I divorced. I'm not even. And so you have to go that distance in terms of turning people around to make a difference in your own life to come -- become even. And you know, I look at -- I -- I don't look at the blocks. I don't look at that reading because you know what? You are damned if you do and you are damned if you don't. So I figure I pretty much have the job of making everybody unhappy. That's just the job you have, and that's just the responsibility of trying to find that balance.

But I want to read from Marian Wright Edelman's book, and she is -- you know, it's a book I really, every once in a while, just need to turn to as just a reminder about how lucky we are and how lucky the opportunities ahead of us, what they may lead to, and if we work hard and if we care hard enough or we believe in other people, what we can

offer to the community. And I looked at her lesson number 5. And I'm not saying this in the context of - - of the choices, the bad, risk choices you made. I want you to understand in your go-forward mode what this may mean.

> Lesson number 5. Don't be afraid of taking risks or of being criticized. And an anonymous sage said, 'If you don't want to be criticized, don't say anything, do anything, or be anything'. Don't be afraid of failing. It's the way you learn to do things right. It doesn't matter how many times you fall down. What matters is how many times you get up. And don't wait for everybody else before you do something. It's always a few people who get more things done and keep things going. This country needs more wise and courageous shepherds and fewer sheep. As a young civil rights lawyer in Mississippi, I remember wanting somehow to provide solace to a beleaguered Dr. King, who was being attacked by friends and foes alike for speaking out against the Vietnam War. I mailed him Theodore Roosevelt's statement: 'It's not the critic who counts. Not the man who points out where the strong man stumbled or where the doer of great deeds could have done them better. The credit belongs to the man,' or the woman, 'who is actually in the arena. Whose face is marred by dust, sweat, and blood. Who

> strives valiantly, who errs and comes up short again and again. And who, while daring greatly, spends himself in a worthy cause so that his place may not be among those cold and timid souls who know neither victory nor defeat.

Now, I say that in the context of choosing your path towards victory or defeat lawfully. And if you do that, your victories will feel so much better, and you will understand the defeat and where you need to go. That's what this representative democracy is all about, and I can appreciate that sense of passion and urgency when you are young and when you just think, if we don't get it done right now, it's just gone. You grow out of childhood and you grow out of concrete thinking, and you see that the world is more complicated.

Some people don't grow out of that, and, as a result, we have courtrooms and jails, and they act outside the bounds of what's acceptable behavior. And if it's not to be acceptable, then you can't do it. And you were raised to believe that because you were raised in a home of two lawyers. And you probably early on understood what that meant. And, again, a rebellious phase, however you were walking through the issues you needed to face, their agony is they can't -- they couldn't save you.

So you need to let them walk through whatever they need to walk through to feel that they were -- did the best they could do. But you also need to let them help you when you come back. Figure out the right path and the way to contribute and the way to make a difference in this world.

You will do that. And I can't tell you how much I admire two faculty members taking the time to come up here and speak, because in the real world, teachers are the heroes. People who go one on one in the classroom, struggling with folks who are trying to figure out what they are going to do when they grow up or how they can contribute or how they can make a difference or where do they fit in. Every single university, every classroom is filled with people looking for a place to belong and to have some guidance. If only we would take some of our precious time and give that back. So their being here today is huge, and their support of you is unwavering, and that you should feel very good about.

THE DEFENDANT: I do.

THE COURT: Because maybe your job will be to train the next generation of doctors as a research professor and a professor who trains the next generation of doctors, and on the side you do medical volunteer work all over the world. The door is completely open to you, unlike many of the people in this courtroom who it will never open for.

So as hard a day as this is for everybody, I see it as a day of hope. I hope you will write Mr. Bramwell a letter and express to him what you said in the courtroom. And I think that will go a long way. People need to get that personal acknowledgment. And that's an important part in your rehabilitation. And number two, when you are out, I hope you will go speak to students and you will tell them, look, don't make the same mistake I made. It's just not worth it. There are other ways. Let me help you find those.

So in doing the analysis, I'm approaching this as I have approached the other cases. Case No. 06-60071, Count 1 through 3, conspiracy, arson, and attempted arson of U.S. Forest Industries, pursuant to 3D1.2, Count 1 through 3, they are grouped together for purposes of sentencing.

The base offense level for this offense is 6 with a 13-level upward adjustment for amount of loss and a two-level upward adjustment for more than minimal planning. Based on the recommendation of probation, I also find a two-level downward adjustment for minor role. I decline to adjust downward an additional two levels for minimal role in that when you had the choice, you went back. And that was after the device didn't ignite and you went pack, and I just can't ignore that.

The government contends that this offense qualifies for the terrorism enhancement because the U.S. Forest Industries harvested timber from federal lands. However, the communiqué issued after this offense targeted, quote, greedy, unquote, corporations but did not, however, mention any conduct of government.

Even though the U.S. Forest Industries had extensive contracts with the government, I cannot find by clear and convincing evidence that that establishes that the offense was calculated to retaliate against government conduct. Perhaps under a more likely than not standard, but not, certainly, clear and convincing.

Regardless, I have the discretion to depart where the guidelines do not adequately take into

account aggravating circumstances of the offense conduct.

And here, the communiqué issued after this offense states -- and please excuse the language. I'm reading the communiqué, and I'm reading it into the record, because I want you to stop and think about what people felt like when they heard these words right after Christmas.

> Happy fucking New Year from the Earth Liberation Front! To celebrate the holiday, we decided on a bonfire. Unfortunately for the U.S. Forest Industries, it was at their corporate headquarters office in Medford, Oregon. On the foggy night after Christmas when everyone was digesting their turkey and pies, Santa's ELFs dropped two five-gallon buckets of diesel/unleaded mix and a one-gallon jug with cigarette delays, which proves to be more than enough to get this party started. And after 40 to 50 firefighters showed up to our party, they were unable to salvage anything, costing these greedy bastards a half a million dollars. This was done in retribution for all the wild forests and animals lost to feed the wallets of greedy fucks like Jerry Bramwell, USFI president. This action is payback, and it is a warning to all others responsible, we do not sleep and we won't quit. For the future generations, we will fight back.

And I read that because it is a devastating message, period. And down the road, people need to know, when these messages and actions are taken, they will be held accountable.

And, again, for the record, next time, the sentences given in these cases, they will be wishing they had thought long and hard before they took that action.

In some ways, I would note, it is curious that the enhancement only applies to the offense that targets government conduct. And I say that as tongue in cheek, because, of course it makes a big difference to target government, to target the very essence of how we are governed.

But it also needs to be taken into account that we have to recognize using intimidation and violence against private individuals really isn't much different and really should not be in any way condoned. At the same time, I do not necessarily think that they should be treated so dramatically different, and that is why I have routinely departed so that the message, because people are concrete thinkers, oh, can't torch government but we have a pass on private property. And given the concrete thinking out there, I just want to make sure they understand, one way or the other, that will be recognized and dealt with.

Therefore, I find that 3A1.4 does not adequately take into account the defendant's intent to frighten, intimidate, and coerce private individuals at the U.S. Forest Industries through her actions. I therefore exercise my discretion under

5K2.0 to depart upward by 12 levels, resulting in an offense level of 31, which is the resulting offense level had the enhancement been applied.

Based on the agreement of the parties, the defendant in this instance, you will receive a three-level downward adjustment for acceptance of responsibility, resulting in a total offense level of 28.

Your criminal history category is 0 resulting in a category I.

Based on the offense level of 28 and your criminal history category of I, the guidelines range is 78 to 97 months.

Mr. Ray, do you have a motion?

MR. RAY: Yes, Your Honor. The government would move for a downward departure of four levels from level 28 to level 24, based upon Ms. Tankersley's cooperation and substantial assistance to the government, and we would ask that you impose a sentence of 51 months.

THE COURT: And I note the request and I do understand the analysis, and I do understand once that door is open, the court has discretion, and I have exercised that discretion and I have chosen to do that to varying levels in each case.

What has made this case difficult as well as both professionally impressive is the tremendous lawyering on both sides and the tremendous thought, compassion, vigilance to not only protect the rights of the community but to protect the rights

of the individuals, and to walk carefully through decisions that were necessary to resolve a very, very complex case that, had there been no negotiations, might have taken years to finish trying.

As a result of the government's incredible efforts and willingness to sit down and walk through and come up with their analysis and the defense ability to sit down and discuss their individual clients and work towards a resolution that either resolves certain issues or left available for argument individual defendant's needs in cases and factors, everybody brought their A game. And that is a privilege to preside over.

But I also need to tell you, in doing that, you can only think through these issues so hard and so long when you are entering into that complicated set of scenarios. And as a judge, I have a choice to decide that, you know, I know better about how all these cases should be resolved or to understand that I have the ability to work within the confines of very fine lawyering that reached an agreement to resolve these cases and reserve some issue for discussion.

Where those issues have been reserved, I have given recognition, because I think it's very, very important that people get the message, when you step up and you do the right thing, you take responsibility and you hold yourself out willing to take the punishment that will be meted out, that is what the system rewards, period. You deserve that.

And other people may criticize you for stepping up and doing the right things, and as I said earlier, where are they? They are still in the

shadows, they are still criticizing, and they are in a different game. And when they get caught in that game, you are not going to be there to help them, just as they are not here to help you today.

So I have appreciated your extraordinary cooperation with the government. I noted that you were timely and truthful. I also acknowledge that you certainly had the right to get legal advice before you talked to anybody. I gave acknowledgment to Mr. Meyerhoff because he just simply started talking because he had an overwhelming need to do that. That in no way should be diminished by someone's need to have all their options looked at by a lawyer to preserve and protect that.

But I will give you that extraordinary recognition. And I really want to underscore and note that you did take yourself out of this entire conspiracy long before -- long before people understood or knew, and it continued for some time thereafter, and that's to be acknowledged.

But I have to balance that off, again, with the incredible dangerousness of what was done and the damage and the magnitude.

So therefore, I choose to depart downward one additional level for a final offense level of 23, applicable guideline range of 46 to 57 months.

I have looked at and have considered and discussed factors that are set out in 18 U.S.C. ° 3553 in selecting a sentence based on the nature and circumstances of this offense; your own history and characteristics; again, the goals of sentencing,

protection of the public, adequately afford deterrence, and the crime that warrants a reasonable but not greater than necessary sentence.

Therefore, with regard to Count 1, you are committed to the Bureau of Prisons for a period of 46 months. With regard to Count 2 and 3, you are committed to the Bureau of Prisons for confinement for a period of 46 months, to be served concurrent with the sentence imposed in Count 1 and with each other.

. . .

APPENDIX D

UNITED STATES COURT OF APPEALS,
NINTH CIRCUIT

No. 07-30334

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE,
v.
KENDALL TANKERSLEY, AKA SARAH KENDALL HARVEY;
KENDALL, DEFENDANT-APPELLANT.

D.C. NO. CR-06-60071-ALA
DISTRICT OF OREGON,
EUGENE

ORDER

Before: TALLMAN, CLIFTON, and N.R. SMITH, Circuit Judges.

The panel has voted to deny the petition for panel rehearing and to deny the petition for rehearing en banc.

The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R.App. P. 35.

The petition for panel rehearing and the petition for rehearing en banc are denied.

(Dated: December 1, 2008)

APPENDIX E

18 U.S.C. § 3553. Imposition of a sentence

(a) Factors to be considered in imposing a sentence.—The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider—

. . .

(5) any pertinent policy statement—

(A) issued by the Sentencing Commission pursuant to section 994(a)(2) of title 28, United States Code, subject to any amendments made to such policy statement by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(B) that, except as provided in section 3742(g), is in effect on the date the defendant is sentenced.

APPENDIX F

18 U.S.C. § 3742. Review of a sentence

(a) Appeal by a defendant. A defendant may file a notice of appeal in the district court for review of an otherwise final sentence if the sentence —

(1) was imposed in violation of law;

(2) was imposed as a result of an incorrect application of the sentencing guidelines . . .

. . .

(b) Appeal by the Government. The Government may file a notice of appeal in the district court for review of an otherwise final sentence if the sentence —

(1) was imposed in violation of law;

(2) was imposed as a result of an incorrect application of the sentencing guidelines;

. . .

(f) Decision and disposition. If the court of appeals determines that

(1) the sentence was imposed in violation of law or imposed as a result of an incorrect application of the sentencing guidelines, the court shall remand the case for further sentencing proceedings with such instructions as the court considers appropriate;

(2) the sentence is outside the applicable guideline range and the district court failed to provide the required statement of reasons in the order of judgment and commitment, or the departure is based on an impermissible factor, or is to an unreasonable degree, or the sentence was imposed for an offence for which there is no applicable sentencing guideline and is plainly unreasonable, it shall state that specific reasons for its conclusions and —

(A) if it determines that the sentence is too high and the appeal has been filed under subsection (a), it shall set aside the sentence and remand the case for further sentencing proceedings with such instructions as the court considers appropriate, subject to subsection (g);

(B) if it determines that the sentence is too low and the appeal has been filed under subsection (b), it shall set aside the sentence and remand the case for further sentencing proceedings with such instructions as the court considers appropriate, subject to subsection (g);

...

APPENDIX G

U.S.S.G § 5K2.0. Grounds for Departure (Policy Statement) (2000)

Under 18 U.S.C. §3553(b), the sentencing court may impose a sentence outside the range established by the applicable guidelines, if the court finds "that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described." Circumstances that may warrant departure from the guideline range pursuant to this provision cannot, by their very nature, be comprehensively listed and analyzed in advance. The decision as to whether and to what extent departure is warranted rests with the sentencing court on a case-specific basis. Nonetheless, this subpart seeks to aid the court by identifying some of the factors that the Commission has not been able to take into account fully in formulating the guidelines. Any case may involve factors in addition to those identified that have not been given adequate consideration by the Commission. Presence of any such factor may warrant departure from the guidelines, under some circumstances, in the discretion of the sentencing court. Similarly, the court may depart from the guidelines, even though the reason for departure is taken into consideration in determining the guideline range (*e.g.*, as a specific offense characteristic or other adjustment), if the court determines that, in light of unusual circumstances,

the weight attached to that factor under the guidelines is inadequate or excessive.

Where, for example, the applicable offense guideline and adjustments do take into consideration a factor listed in this subpart, departure from the applicable guideline range is warranted only if the factor is present to a degree substantially in excess of that which ordinarily is involved in the offense. Thus, disruption of a governmental function, § 5K2.7, would have to be quite serious to warrant departure from the guidelines when the applicable offense guideline is bribery or obstruction of justice. When the theft offense guideline is applicable, however, and the theft caused disruption of a governmental function, departure from the applicable guideline range more readily would be appropriate. Similarly, physical injury would not warrant departure from the guidelines when the robbery offense guideline is applicable because the robbery guideline includes a specific adjustment based on the extent of any injury. However, because the robbery guideline does not deal with injury to more than one victim, departure would be warranted if several persons were injured.

Also, a factor may be listed as a specific offense characteristic under one guideline but not under all guidelines. Simply because it was not listed does not mean that there may not be circumstances when that factor would be relevant to sentencing. For example, the use of a weapon has been listed as a specific offense characteristic under many guidelines, but not under other guidelines. Therefore, if a weapon is a relevant factor to

sentencing under one of these other guidelines, the court may depart for this reason.

Finally, an offender characteristic or other circumstance that is, in the Commission's view, not ordinarily relevant in determining whether a sentence should be outside the applicable guideline range may be relevant to this determination if such characteristic or circumstance is present to an unusual degree and distinguishes the case from the "heartland" cases covered by the guidelines.

APPENDIX H

U.S.S.G. § 3A1.4. Terrorism (2000)

(a) If the offense is a felony that involved, or was intended to promote, a federal crime of terrorism, increase by 12 levels; but if the resulting offense level is less than 32, increase to 32.

(b) In each such case the defendant's criminal history category from Chapter Four (Criminal History and Criminal Livelihood) shall be Category VI.

Application Notes:

1. Subsection (a) increases the offense level if the offence involved, or was intended to promote, a federal crime of terrorism. "Federal crime of terrorism" is defined at 18 U.S.C. § 2332b(g).

2. Under subsection (b), if the defendant's criminal history category as determined under Chapter Four (Criminal History and Criminal Livelihood) is less than Category VI, it shall be increased to Category VI.

APPENDIX I

U.S.S.G. § 5K2.15. Terrorism (1989)

(a) If the Defendant committed the offense in furtherance of a terroristic action, the court may increase the sentence above the authorized guideline range.

No. 08-1104

In the Supreme Court of the United States

KENDALL TANKERSLEY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly affirmed petitioner's sentence as reasonable under *United States* v. *Booker*, 543 U.S. 220 (2005), and the factors set forth in 18 U.S.C. 3553(a), notwithstanding the court's failure to consider whether the district court had correctly relied on Sentencing Guidelines § 5K2.0 in departing from the advisory Guidelines range.

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In the Supreme Court of the United States

No. 08-1104

KENDALL TANKERSLEY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-35a) is reported at 537 F.3d 1100.

JURISDICTION

The judgment of the court of appeals was entered on August 12, 2008. A petition for rehearing was denied on December 1, 2008 (Pet. App. 68a). The petition for a writ of certiorari was filed on March 2, 2009 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a guilty plea in the United States District Court for the District of Oregon, petitioner was convicted of conspiracy to commit arson and destruction of an energy facility, in violation of 18 U.S.C. 371; attempted

arson, in violation of 18 U.S.C. 2 and 844(i); and arson, in violation of 18 U.S.C. 2 and 844(i). She was sentenced to 41 months of imprisonment, to be followed by three years of supervised release. The court of appeals affirmed. Pet. App. 1a-35a.

1. From 1996 to 2001, activist groups known as the Earth Liberation Front (ELF) and the Animal Liberation Front worked to damage or destroy property belonging to government agencies and private companies that the group believed were harming the environment. As many as 16 individuals, including petitioner, participated in the conspiracy to destroy property. The conspirators committed multiple crimes in five Western States and caused tens of millions of dollars in property damage. Pet. App. 2a-4a.

In December 1998, as part of the conspiracy, petitioner and several co-conspirators agreed to target the headquarters building of U.S. Forest Industries, Inc., a private timber company in Oregon that had substantial logging contracts with the United States Forest Service, a government entity. Pet. App. 2a, 6a-7a, 14a n.7. Petitioner conducted the initial research of the company's building. Gov't C.A. Br. 9. On December 22, she served as a lookout while her cohorts placed timed incendiary devices near the building. The conspirators fled after placing the devices, and they learned later that the devices had malfunctioned. A few days later, petitioner and one of her co-conspirators, Jacob Ferguson, gathered materials for new devices. Petitioner then drove Ferguson back to the U.S. Forest Industries building and waited in the car while Ferguson placed the new devices. This time the devices ignited and the building burned. The fire caused a loss of about $990,000. Pet.

App. 6a-7a; Gov't C.A. Br. 9-11; Presentence Report (PSR) ¶¶ 25-32.

In January 1999, after conferring with petitioner, Ferguson released a "media communiqué" in which ELF took credit for the fire. The communiqué stated that the fire was "in retribution for all the wild forests and animals lost to feed the wallets of greedy fucks like Jerry Bramwell, U.S.F.I. president," and was "payback and * * * a warning, to all others responsible we do not sleep and we won't quit. For the future generations we will fight back." Pet. App. 7a-8a.

In February 1999, petitioner and Ferguson researched and performed reconnaissance at a United States Bureau of Land Management facility in Litchfield, California. Later, without petitioner's involvement, the conspirators destroyed that government facility through arson. Pet. App. 8a-9a; Gov't C.A. Br. 13; PSR ¶ 64.

2. In December 2005, petitioner was arrested. She waived indictment and pleaded guilty to a three-count information charging her with conspiracy to commit arson and destruction of an energy facility, in violation of 18 U.S.C. 371; attempted arson, in violation of 18 U.S.C. 2 and 844(i); and arson, in violation of 18 U.S.C. 2 and 844(i). Pet. App. 1a, 4a-5a, 9a; Gov't C.A. Br. 2-3.

Before sentencing, the government submitted a detailed sentencing memorandum recounting the conspiracy as relevant to each defendant's sentencing calculations. C.A. E.R. 250-408. As to petitioner, the government argued for, *inter alia*, a terrorism enhancement under Sentencing Guidelines § 3A1.4 (2000),[1] which pro-

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[1] Unless otherwise indicated, citations in this brief to the Sentencing Guidelines refer to the November 2000 Guidelines Manual, under which

vides for a 12-level upward offense-level adjustment and an automatic increase to criminal history category VI where "the offense is a felony that involved, or was intended to promote, a federal crime of terrorism." The Guidelines incorporate the definition of "federal crime of terrorism" in 18 U.S.C. 2332b(g), which includes the arson of certain property in violation of 18 U.S.C. 844(i), where the offense "is calculated to influence or affect the conduct of government by intimidation or coercion, or to retaliate against government conduct." Guidelines § 3A1.4, comment. (n.1); 18 U.S.C. 2332b(g)(5) (2000).[2] In support of the terrorism enhancement, the government contended that the arson of U.S. Forest Industries' headquarters "was calculated to influence or affect the future conduct of government and private business," and it was therefore a "federal crime of terrorism" under Section 3A1.4, noting that: (a) U.S. Forest Industries was "well known" for its extensive logging contracts with the federal government (C.A. E.R. 322); (b) Ferguson's communiqué had sent "a warning" to "all others responsible" for the "los[s]" of "wild forests," which forests necessarily included federally owned land subject to timber sales (*ibid.*); and (c) for her part, petitioner "frequently and publicly spoke out against the government, particularly on television," and her research on U.S. Forest Industries included the company's timber contracts with the federal government (*id.* at 328).

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petitioner's advisory Guidelines sentence was calculated. See PSR ¶ 5.

[2] Although Section 2332b(g)(5) has since been amended, the current version of the statute is identical in all material respects to the version in effect in 2000. See 18 U.S.C. 2332b(g)(5) (2006).

In petitioner's PSR, the Probation Office calculated a base offense level of six (PSR ¶ 42; see Guidelines §§ 2K1.4(a)(4), 2B1.3(a)); added a 13-level enhancement because the arson caused a loss of between $800,000 and $1.5 million (PSR ¶ 43; see Guidelines §§ 2B1.3(b)(1), 2B1.1(b)(1)(N)); assessed a two-level enhancement because the arson involved more than minimal planning (PSR ¶ 44; see Guidelines § 2B1.3(b)(3)); agreed with the government that a 12-level increase was warranted because the arson "involved, or was intended to promote, a federal crime of terrorism" (PSR ¶ 45; see Guidelines § 3A1.4); recommended a two-level downward adjustment because petitioner was a minor participant in the arson (PSR ¶ 46; see Guidelines § 3B1.2(b)); and recommended a three-level downward adjustment because petitioner accepted responsibility for her offenses (PSR ¶ 49; see Guidelines § 3E1.1). The probation office thus calculated a total offense level of 28. PSR ¶ 50. It further reported that petitioner had three adult criminal convictions but that they did not result in any criminal history points. PSR ¶¶ 52-55. Though zero criminal history points would normally result in a criminal history category of I, the Probation Office assessed a criminal history category of VI under Guidelines § 3A1.4. PSR ¶ 56; see Guidelines § 3A1.4(b); see also Pet. App. 12a.

At its initial sentencing hearing, the district court adopted all of the PSR's Guidelines assessments except one: it declined to apply the terrorism enhancement under Guidelines § 3A1.4. Pet. App. 61a. Emphasizing that Ferguson's post-arson communiqué did not specifically "mention any conduct of government," the court concluded that the government had failed to prove, "by clear and convincing evidence," that the arson of the

U.S. Forest Industries building "was calculated to retaliate against government conduct." *Ibid.* (suggesting that the government's evidence may have sufficed "under a more likely than not standard, but not [under the] clear and convincing" standard required by relevant Ninth Circuit case law).

Nevertheless, the district court decided to depart upward by 12 levels under Guidelines § 5K2.0, on grounds that the advisory Guidelines range, absent the enhancement, did "not adequately take into account [petitioner's] intent to frighten, intimidate, and coerce private individuals at the U.S. Forest Industries through her actions." Pet. App. 63a-64a. The court explained that "we have to recognize using intimidation and violence against private individuals really isn't much different" from using intimidation and violence against the government, and it should not be treated as "so dramatically different" that offenders receive a "pass" because they destroyed "private property" rather than "torch[ing] [the] government." *Id.* at 63a.

The district court's 12-level upward departure resulted in an offense level equivalent to the offense level that would have applied under the terrorism enhancement in Guidelines § 3A1.4(a). Pet. App. 64a. The court did not, however, depart upward in petitioner's criminal history category, which remained at category I, rather than VI. *Ibid.*; cf. Guidelines § 3A1.4(b). The court granted a downward departure of four levels (to offense level 24) based on the government's substantial-assistance motion under Guidelines § 5K1.1, and "ch[o]se to depart one additional level for a final offense level of 23" because petitioner had ceased her involvement in the conspiracy "long before" the conspirators were apprehended. Pet. App. 64a-66a. With a total offense level of

23 and a criminal history category of I, petitioner's advisory Guidelines range was 46 to 57 months. *Id.* at 66a. After "consider[ing]" the "factors that are set out in 18 U.S.C. [§] 3553," the court sentenced petitioner to 46 months, stating that 46 months of imprisonment was "reasonable but not greater than necessary." *Id.* at 66a-67a.

Shortly after the initial sentencing hearing, petitioner moved to reopen the sentencing on the ground that she had received insufficient notice of the district court's intent to depart upward by 12 levels. The court granted the motion and held a second hearing. Pet. App. 16a-17a.

At the second sentencing hearing, the district court largely adhered to its earlier determinations. Pet. App. 36a-49a. The court again imposed a 12-level upward departure on the ground that the advisory range, absent the terrorism enhancement, did not adequately account for petitioner's "intent to frighten, intimidate, and coerce private individuals at * * * U.S. Forest Industries." *Id.* at 45a. The court further explained that the departure was designed in part to ensure sentencing parity between petitioner and her co-conspirators, some of whom had received enhancements under Guidelines § 3A1.4, since "the purposes of the conspiracy, the means, motives, intents, and actions to carry out those purposes were the same and should be treated similarly." Pet. App. 38a. The court departed downward one additional level, however, based on petitioner's early abandonment of the conspiracy, resulting in a total offense level of 22, and an advisory Guidelines range of 41 to 51 months. *Id.* at 42a, 48a. The court imposed a sentence of 41 months of imprisonment, stating that such a

term was consistent with the sentencing factors set forth in 18 U.S.C. 3553(a). Pet. App. 47a-49a.

3. The court of appeals affirmed. Pet. App. 1a-35a. The court rejected petitioner's arguments that her sentence was unreasonable. Pet. C.A. Br. 22-34. First, relying on *Kimbrough* v. *United States*, 128 S. Ct. 558 (2007), the court rejected petitioner's argument that the district court's decision to impose a 12-level upward departure was unreasonable because, in petitioner's view, it was based on a policy disagreement with the Sentencing Guidelines. Pet. App. 25a-29a.

The court of appeals next turned to petitioner's arguments that the upward departure was erroneous under Guidelines § 5K2.0 and that a 12-level departure was unreasonable in any event. Pet. App. 29a-35a. The court reviewed both contentions under a "unitary" standard of reasonableness. *Id.* at 29a-31a (quoting *United States* v. *Mohamed*, 459 F.3d 979, 987 (9th Cir. 2006)). The court noted that, after this Court's decision in *United States* v. *Booker*, 543 U.S. 220 (2005), "the scheme of downward and upward departures" under the Guidelines "has been replaced by the requirement that judges impose a reasonable sentence." Pet. App. 29a (citing *Mohamed*, 459 F.3d at 986). The court further explained that, under circuit law, although the departure scheme remains relevant "insofar as factors that might have supported (or not supported) a departure may tend to show that a non-guidelines sentence is (or is not) reasonable," *id.* at 30a, the court did not "need to consider whether the district court correctly applied the departure provision in § 5K2.0," but rather whether the district court imposed a reasonable sentence, *id.* at 31a.

Reviewing petitioner's 41-month sentence in light of the factors enumerated in 18 U.S.C. 3553(a), the court of

appeals concluded that the sentence was reasonable. Pet. App. 31a-35a. The court noted that the district judge had sentenced ten individuals involved in the conspiracy, *id.* at 35a, and held that the judge could properly "conclude that, given the objectives of the criminal conspiracy, those co-defendants for whom the terrorism enhancement did not directly apply should not be treated" substantially more leniently than the conspirators for whom it did apply, *id.* at 34a. The court further reasoned that the judge could properly consider "the grave nature and aggravated circumstances of [petitioner's] offense, the enormous destruction it caused, and the intent to harm and intimidate entire communities." *Id.* at 35a. Finally, the court noted that the district judge had granted *downward* departures from the advisory Guidelines range based on several mitigating factors, including petitioner's remorse, withdrawal from the conspiracy, and cooperation with the government. *Id.* at 16a, 34a-35a. Thus, in the court's view, the resulting 41-month sentence "was well-reasoned and properly based on the § 3553(a) factors." *Id.* at 35a.

ARGUMENT

Petitioner renews her claim (Pet. 9-28) that her sentence was unreasonable because the district court erred in granting a 12-level upward departure under the Sentencing Guidelines. The court of appeals correctly held that petitioner's 41-month sentence was reasonable. Although the court's standard of review differs somewhat from the standards that some other circuits apply, this case would not be a suitable vehicle for resolving any tension between the approaches of the courts of appeals, since petitioner's sentence was reasonable under any standard. Further review is unwarranted.

1. In *United States* v. *Booker*, 543 U.S. 220 (2005), this Court held that the mandatory Sentencing Guidelines system was invalid under the Sixth Amendment. As a remedy, the Court invalidated those provisions of federal sentencing law that made the Guidelines mandatory, 18 U.S.C. 3553(b)(1) (Supp. IV 2004), and that required appellate review in conformance with the Guidelines, 18 U.S.C. 3742(e) (2000 & Supp. IV 2004). 543 U.S. at 245, 259. Recognizing that the excision of Section 3742(e) would leave the federal sentencing statute without an explicit standard of appellate review, the Court relied on the pre-2003 version of the provision to "infer * * * a practical standard of review already familiar to appellate courts: review for 'unreasonable[ness],'" taking into consideration the statutory sentencing factors in 18 U.S.C. 3553(a). *Booker*, 543 U.S. at 260-261 (brackets in original) (quoting 18 U.S.C. 3742(e)(3) (1994)).

As petitioner correctly notes (Pet. 11-12), in the wake of *Booker*, the courts of appeals have taken different approaches to review of non-Guidelines sentences, depending on whether the district court's deviation from the Guidelines range rested on the court's authority under the Guidelines to "depart" from the Guidelines sentence, see Guidelines § 1B1.1, comment. (n.1(E)) (2008), or its discretion to "vary" from the Guidelines sentence based on Section 3553(a). Several courts of appeals have indicated that, in reviewing a non-Guidelines sentence for reasonableness, a court should first review the propriety of any Guidelines departures under the relevant Guidelines departure provisions (*e.g.*, Guidelines § 5K2.0) and only thereafter review whether the ultimate sentence imposed was reasonable under Section 3553(a). See, *e.g.*, *United States* v. *Wallace*, 461 F.3d 15,

32-33 (1st Cir. 2006); *United States* v. *Selioutsky*, 409 F.3d 114, 118 (2d Cir. 2005); *United States* v. *Saldana*, 427 F.3d 298, 310-313 (5th Cir.), cert. denied, 546 U.S. 1067 (2005), and 546 U.S. 1122 (2006); *United States* v. *Munoz-Tello*, 531 F.3d 1174, 1186 (10th Cir. 2008), cert. denied, 129 S. Ct. 1314 (2009); *United States* v. *Crawford*, 407 F.3d 1174, 1181-1182 (11th Cir. 2005).

By contrast, the Seventh and Ninth Circuits review all sentences outside the otherwise applicable Guidelines range, like within-Guidelines sentences, for reasonableness under Section 3553(a), without separately considering the correctness of any departure under the Guidelines. See, *e.g.*, *United States* v. *Johnson*, 427 F.3d 423, 426 (7th Cir. 2005); *United States* v. *Mohamed*, 459 F.3d 979, 987 (9th Cir. 2006).[3]

2. This case is not, however, a suitable vehicle for resolving any differences among the courts of appeals, since petitioner's sentence was reasonable under any standard. Petitioner's claim that the district court abused its discretion in departing upward by 12 levels under Guidelines § 5K2.0 (Pet. 23-27; see Pet. App. 25a-35a) would fail even in those circuits that assess the propriety of traditional Guidelines departures as a discrete step of reasonableness review.[4]

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[3] Although the Ninth Circuit has held that departures and variances are subject to a "unitary" review for reasonableness, it has also made clear that courts may continue to consult the Guidelines' departure provisions, *Mohamed*, 459 F.3d at 987, and that those provisions remain relevant "insofar as factors that might have supported (or not supported) a departure may tend to show that a non-guidelines sentence is (or is not) reasonable," Pet. App. 30a; see also *Mohamed*, 459 F.3d at 987.

[4] Indeed, it is far from clear that petitioner is not subject to the terrorism enhancement in Guidelines § 3A1.4. The district court found

a. Section 5K2.0 authorizes a district court to depart from the advisory Guidelines range "if the court finds 'that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration'" by the advisory range. Guidelines § 5K2.0 (quoting 18 U.S.C. 3553(b)). The provision itself counsels strong deference to the district court: "The decision as to whether and to what extent [a] departure is warranted rests with the sentencing court on a case-specific basis." Guidelines § 5K2.0; accord *Koon* v. *United States*, 518 U.S. 81, 96-100 (1996) (holding that decisions to depart from the Guidelines are reviewable for abuse of discretion).

The district court in this case properly exercised its discretion based on the specifics of petitioner's offense, concluding that the Guidelines did not "adequately take into account aggravating circumstances of the offense conduct." Pet. App. 45a. The court emphasized that (1) petitioner shared the same overarching goals as her co-conspirators and should therefore "be treated simi-

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that the government had failed to establish by "clear and convincing evidence" that petitioner's offense was "calculated to retaliate against government conduct," but it acknowledged that, "[p]erhaps" it could be shown that petitioner's offense was so calculated "under a more likely than not standard." Pet. App. 61a. Although the government did not challenge the applicability of the "clear and convincing evidence" standard in the Ninth Circuit, and the court therefore "assume[d], without deciding" that it applied, *id.* at 11a n.5, the Ninth Circuit's application of a "clear and convincing" standard to certain determinations under the Guidelines is a minority position that is incorrect. See, *e.g.*, *United States* v. *Villareal-Amarillas*, No. 07-3616, 2009 WL 939125, at *3-*4 & nn.3-4 (8th Cir. Apr. 9, 2009). Under the correct, preponderance standard, the district court might well have applied the terrorism enhancement because "U.S. Forest Industries," the target of the arson, "harvested timber from federal lands." Pet. App. 61a.

larly" to them even though her conduct, unlike theirs, did not directly target the government, *id.* at 38a;[5] and (2) petitioner's arson of the U.S. Forest Industries building sent such a "devastating" and "frighten[ing]" "message" to the community that special deterrence was "need[ed]" to ensure that similarly-situated offenders would not think they would receive a "pass" when destroying private (as opposed to government) property, *id.* at 61a-63a.[6]

b. In any event, even had the district court erred in granting a Guidelines departure, any such error would

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[5] Notably, although the district court treated petitioner "similarly" to the co-conspirators who directly targeted the government (Pet. App. 38a), it did not treat her as though she herself had directly targeted the government under Guidelines § 3A1.4. As noted (p. 6, *supra*), the court did not enhance petitioner's criminal history category from I (the category that applied given her lack of criminal history points) to VI (the category that would have applied under the terrorism enhancement). If the court had done so, petitioner's ultimate advisory imprisonment range—even accounting for the downward departures that she received—would have been 84 to 105 months, or more than twice the range to which she was actually subject.

[6] Petitioner contends (Pet. 23-24) that the upward departure was erroneous under Guidelines § 5K2.0 because the aggravating circumstances cited by the district court failed to constitute circumstances "not adequately taken into consideration by the Sentencing Commission." That argument appears to rest on an inference from the Guidelines' deletion of a previous policy statement authorizing departures if "the defendant committed the offense in furtherance of a terroristic action." Guidelines § 5K2.15 (1989); see Pet. 24. But petitioner offers no persuasive reason to think either that the aggravating circumstances identified by the district court were already factored into the Guidelines calculation, or that the Guidelines precluded consideration of those circumstances. Indeed, in 2002, the Sentencing Commission amended the commentary to Guidelines § 3A1.4 to clarify that upward departures may be warranted for terrorism offenses targeting civilians. Guidelines § 3A1.4, comment. (n.4) (2002).

be subject to harmless-error review under Federal Rule of Criminal Procedure 52(a). Here, the district court's extensive explanation of its sentencing decision indicates that the court would have imposed the same sentence on petitioner, regardless of the Guidelines departure provisions, in order to comply with its statutory obligation to "impose a sentence sufficient, but not greater than necessary" under 18 U.S.C. 3553(a). See Pet. App. 42a-43a, 47a-49a; see also *id.* at 31a-32a. Petitioner does not contend that her 41-month sentence is unreasonable under Section 3553(a). Any error under the departure provisions of the Guidelines is therefore harmless. See *Mohamed*, 459 F.3d at 987.[7]

3. Petitioner also contends (Pet. 20-23) that this Court's review is warranted to resolve whether and to what extent this Court's decision in *Williams* v. *United States*, 503 U.S. 193 (1992), "remains valid after * * * *Booker*." Pet. i; see Pet. 20-23.

This Court held in *Williams* that when a sentencing court departs on both valid and invalid grounds, a remand is required unless the reviewing court determines that the sentence was reasonable and that the sentencing court would have imposed the same sentence absent consideration of the invalid grounds. 503 U.S. at 199-205. In so holding, the Court relied on 18 U.S.C. 3742(f)(1), which provides for a remand where "the court of appeals determines that * * * the sentence was * * * imposed as a result of an incorrect applica-

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[7] Although petitioner argues (Pet. 27) that the district court's sentencing of her co-conspirators demonstrates that it would not have imposed a 41-month sentence on petitioner had it not deemed an upward departure to be appropriate under the Guidelines, the district court's extensive discussion of the issue is to the contrary. See Pet. App. 36a-49a.

tion of the sentencing guidelines." See *Williams*, 503 U.S. at 199-205. As petitioner points out (Pet. 20), the Court in interpreting Section 3742(f)(1) reasoned that "a sentencing court's use of an invalid departure ground is an incorrect application of the Guidelines." 503 U.S. at 200.

Petitioner reads the latter statement to mean that Section 3742(f)(1), even after *Booker*, requires a court of appeals to evaluate a traditional Guidelines departure as a discrete step of its reasonableness review, rather than under a unitary standard focusing on Section 3553(a). Pet. 20-22. But petitioner did not make that argument in her opening brief on appeal (Pet. C.A. Br. 45-47), so neither the government (Gov't C.A. Br. 33-34) nor the court of appeals (Pet. App. 19a-20a, 29a-31a) had occasion to address it.[8] And this Court's "traditional" practice ordinarily "precludes a grant of certiorari * * * when the question presented was not pressed or passed upon below." *United States* v. *Williams*, 504 U.S. 36, 41 (1992) (internal quotation marks and citation omitted). Petitioner suggests no basis for an exception to that principle.

In any event, petitioner would not be entitled to relief under the rule in *Williams* because there was no error under the Guidelines. Remand is not required under *Williams*, moreover, if the reviewing court "concludes, on the record as a whole, that the error was harmless, *i.e.*, that the error did not affect the district court's selection of the sentence imposed." 503 U.S. at

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[8] Petitioner relied on *Williams* for a non-unitary standard in her court of appeals reply brief (Pet. C.A. Reply Br. 2-3, 28), but the Ninth Circuit has long held that "arguments not raised by a party in its opening brief are deemed waived." *E.g.*, *Smith* v. *Marsh*, 194 F.3d 1045, 1052 (1999).

203. See pp. 12-14, *supra*. Because resolution of the *Williams* issue would have no effect on petitioner's sentence, further review of that issue is not warranted in this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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SUPREME COURT, U.S.

In the Supreme Court of the United States

KENDALL TANKERSLEY,

Petitioner,

v.

UNITED STATES OF AMERICA ,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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PETITIONER'S REPLY TO BRIEF IN OPPOSITION

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ARGUMENT

I. This Appeal Provides An Appropriate Vehicle For The Court To Resolve The Undisputed And Mature Circuit Split Regarding The Fundamental Issue Of Appellate Review Of Departure Decisions.

In opposition to Ms. Tankersley's Petition for Certiorari, the United States does not dispute the existence of a nine-to-two circuit split concerning a matter of fundamental appellate review of federal sentencing that fully warrants this Court's exercise of certiorari review. Instead, the United States opposes a grant of certiorari on the ground that this particular case supposedly does not present a good "vehicle" for resolving the circuit split. (Brief in Opp. at 11.) None of the purported bases for this assertion survive close scrutiny, however.

The United States contends that this case is not "a suitable vehicle" because Ms. Tankersley's sentence "was reasonable under any standard." (Brief in Opp. at 11.) But that assertion merely begs the questions presented by the Petition for Certiorari:

- Now that the Sentencing Guidelines are advisory under *United States v. Booker*, 543 U.S. 220 (2005), is a court of appeals still required to review the propriety of a departure from the Guidelines distinctly from review of the ultimate sentence for reasonableness?

- Does *Booker*'s mandate that federal courts calculate and take into consideration the Guidelines include the departure Guidelines? 543 U.S. at 264.

- Does the rule in *Williams v. United States*, 503 U.S. 193 (1992) – that a sentencing court's use of an erroneous ground for departure constitutes an incorrect application of the Guidelines – remain valid after *Booker*?

- Is it tenable for the courts of appeals and district courts in a minority of two circuits to continue to treat departures as "obsolete" and "anachronistic" in the wake of this Court's recent opinion in *Irizarry v. United States*, 128 S.Ct. 2198 (2008), which emphasizes the categorical distinction between departures and variances?

- Given that *Gall v. United States*, 128 U.S. 586 (2007), requires federal courts to consult the Guidelines as the initial benchmark in the sentencing process and to consider the magnitude of any deviation from the correctly calculated Guidelines range, how could the court of appeals properly rule upon the reasonableness of Ms. Tankersley's sentence without determining what her guideline range would have been under a correct application of the Guidelines, including the departure Guideline set forth at U.S.S.G. § 5K2.0?

The Brief of the United States in Opposition does not address any of these key questions. Indeed, the

Brief in Opposition fails to even mention, let alone discuss, *Irizarry* and *Gall.*

A. The Existence Of Several Meritorious Claims Of Departure Error That Were Not Reviewed By The Court Of Appeals Is Unrebutted.

The United States asserts that Ms. Tankersley's claims that the district court abused its discretion by imposing the 12-level upward departure would fail on their merits if subjected to traditional appellate review. (Brief in Opp. at 11.) The United States' analysis of Ms. Tankersley's as yet unreviewed appellate challenges to the upward departure are simply incorrect.

Ms. Tankersley has a meritorious claim that the district court's upward departure was improper because U.S.S.G. § 5K2.0 authorizes a departure only where "the court finds 'that there exists an aggravating or a mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that prescribed.'" U.S.S.G. § 5K2.0 (2000) (App., 72a). The basis for Ms. Tankersley's claim is that the Sentencing Commission had previously promulgated a broader terrorism enhancement guideline, U.S.S.G. § 5K2.15 (1989) (App., 76a), which failed to draw the governmental/private distinction embodied in § 3A1.4 (2000) (App., 75a), the sole basis for the upward departure here. (App., 37a, 45a, 61a-64a.)

The United States' cursory attempt to dispense with this threshold argument is unpersuasive. (Brief in Opp. at 13 n.6.) The issue is not whether "the aggravating circumstance was already factored into the Guidelines calculation," as the United States wrongly suggests, but rather whether the court may properly find that such aggravating circumstance was not adequately taken into consideration by the Sentencing Commission in formulating the Guidelines, as required under § 5K2.0 (2000) (App., 72a). Here, the impact of terrorism on nongovernmental entities had been taken into consideration by the Commission, as evidenced by the earlier promulgation of § 5K2.15 (1989). That guideline, however, had been replaced by the year 2000, for the version of the Guidelines applicable to Ms. Tankersley's sentencing.[1]

Tellingly, the United States offers no arguments whatsoever to attempt to rebut Ms. Tankersley's two additional, as yet unreviewed claims of departure error, each of which is independently sufficient to require remand:

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[1] The United States accurately characterizes a subsequent amendment to the commentary of § 3A1.4 suggesting that upward departures may be warranted for terrorism offenses targeting a civilian population. (Brief in Opp. at 13 n.6.) The United States fails to explain, however, that the district court expressly declined to apply this provision to Ms. Tankersley or her co-conspirators, due to ex post facto concerns and because the government had stipulated that the 2000 version of the Guidelines applied. *United States v. Thurston*, 2007 WL 1500176, at **15-16 (D.Or. May 21, 2007) (Aiken, J.). The United States did not cross-appeal this ruling.

- The departure was unwarranted because there was no evidence of harm sufficient to remove this case from the heartland of arson offenses. (Pet. at 24-25 (citing Appellant's Opening Brief at 27-29 and Appellant's Reply Brief at 18-20).) The court of appeals expressly declined to review this claimed error. (App., 29a-31a.)

- The magnitude of the departure – which *more than tripled* the bottom of the otherwise applicable guideline range – was excessive. (Pet. at 25-26 (citing Appellant's Opening Brief at 29-34 and Appellant's Reply Brief at 21-23).) The court of appeals failed to mention this claimed error. (App., 1a-35a.)[2]

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[2] The United States contends that Ms. Tankersley was not subject to the full impact of the terrorism enhancement, and that if she had been, her range would have been "84 to 105 months." (Brief in Opp. at 13 n.5.) It is technically correct that the district court did not enhance Ms. Tankersley's criminal history category to Category VI (the highest category), as provided for in § 3A1.4(b). However, for each of the co-conspirators, the government and the district court used the magnitude of the substantial assistance downward departures to partially offset some of the harshness of either the terrorism enhancement under § 3A1.4 or the analogous upward departure pursuant to § 5K2.0 (but in the latter instance, to a lesser extent). *See, e.g., United States v. Thurston*, 2007 WL 1500176, at *4 (D.Or. May 21, 2007) (Aiken, J.).

Thus, in Ms. Tankersley's case, the United States' sentencing memorandum, which sought the § 3A1.4 terrorism enhancement against her, provided for a substantial assistance downward departure of up to 14 levels (much greater than the 4 levels that the United States actually recommended) and asked the district court to impose a sentence of 51 months – the same sentence the United States recommended following the district court's application of the upward departure instead of

In order to persuade this Court that Ms. Tankersley's case does not provide an appropriate vehicle for this Court to address the circuit split regarding appellate review of Guidelines departures, the United States would have to convince this Court that *none* of Ms. Tankersley's several arguments for departure error are meritorious. That it has not done.[3]

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the terrorism enhancement. (App., 64a.) If the district court had instead found the terrorism enhancement to be applicable, the United States would have made a substantial assistance motion for a reduction by whatever number of levels was necessary to achieve an applicable guideline range with a bottom end of 51 months. The district court's erroneous 12-level upward departure thus had exactly the same degree of impact on Ms. Tankersley's Guidelines range as the terrorism enhancement would have had, notwithstanding that she remained in Criminal History Category I.

[3] The United States currently challenges the district court's decision to require proof of the draconian terrorism enhancement by "clear and convincing evidence" (Brief in Opp. at 11-12 n. 4). But the United States did not appeal that decision, and it also did not appeal the district court's ruling that the terrorism enhancement was inapplicable to Ms. Tankersley's offenses. (App., 11a n.5.) The United States similarly chose not to appeal the district court's ruling that the terrorism enhancement did not apply to the offenses of one of Ms. Tankersley's co-conspirators. *United States v. Paul*, 290 Fed. Apx. 64, 2008 WL 3560333 (9th Cir. Aug. 12, 2008).

B. The United States Has Not And Cannot Demonstrate That The Departure Errors Are Harmless.

1. The United States is unable to present any persuasive argument that the departure errors committed by the district court are harmless. (Brief in Opp. at 13-14.) To be sure, this Court has held that a sentence resulting from a departure based in part on a legally erroneous ground may nonetheless be affirmed if deemed harmless:

> If the party defending a sentence persuades the court of appeals that the district court would have imposed the same sentence absent the erroneous factor, then a remand is not required under § 3742(f)(1), and the court of appeals may affirm the sentence as long as it is also satisfied that the departure is reasonable under § 3742(f)(2).

Williams v. United States, 503 U.S. 193, 203 (1992).

For the first time, the United States asserts that the district court here "would have imposed the same sentence" on Ms. Tankersley even absent the 12-level upward departure. (Brief in Opp. at 14.) The district court made no such comment during the two lengthy sentencing proceedings for Ms. Tankersley, however. (App., 36a-67a); *cf. United States v. Marsh*, 561 F.3d 81, 86 (1st Cir. 2009) (declining to resolve claimed departure error because "the district court stated that it would have reached the same result in a non-Guideline setting"); *United*

States v. Keene, 470 F.3d 1347, 1350 (11th Cir. 2006) (same).

Moreover, the facts and circumstances of the proceedings in the district court demonstrate that the United States cannot meet its burden to show harmlessness. It is undisputed that the district court conducted a total of twelve sentencing hearings for Ms. Tankersley and her co-conspirators, and that in each and every one, the court imposed a sentence that was within (what it had calculated to be) the ultimate Guidelines range. (Pet. at 27.) Indeed, the notion that the district court had some fixed sentence in mind for Ms. Tankersley that it would have imposed regardless of the advice of the Guidelines is belied by the record here; the court lowered Ms. Tankersley's sentence from the first sentencing hearing (46 months) to the second sentencing hearing (41 months), in each instance imposing the bottom of the Guidelines rage calculated by the court. (App., 48a-49a, 66a-67a.) *See United States v. Delgado-Martinez*, No. 08-50439, 2009 WL 902390, at *3 (5th Cir. Apr. 6, 2009) (failing to find that district court would have imposed the same sentence absent Guidelines error in part because the district court had expressly stated that it was selecting a sentence "at the bottom" of the applicable range).

2. The United States further argues that Ms. Tankersley "does not contend that her 41-month sentence is unreasonable under § 3553(a)" and that "any error under the departure provisions of the Guidelines is therefore harmless." (Brief in Opp. at 14.) The United States is doubly mistaken.

First and foremost, Ms. Tankersley does indeed contend that her sentence was procedurally and substantively unreasonable, given the district court's departure error. In her Opening Brief before the court of appeals, Ms. Tankersley argued that procedural error occurs when a district court improperly calculates the defendant's Guidelines range based on an erroneous departure. (Appellant's Opening Brief at 21-34.) Before both the court of appeals and this Court, Ms. Tankersley has noted that *Gall* requires reviewing courts to first ensure that the sentencing court has correctly applied the Guidelines range, including application of the departure Guidelines. (Appellant's Reply Brief at 28[4] ("Here, 'an unreasonable approach produced an unreasonable sentence.'") (citation omitted); Pet. at 13.) Ms. Tankersley has also argued that under *Gall*, review for substantive reasonableness must take into account the extent of any departure or variance from the Guidelines range, whereas the court of appeals opinion: (i) fails to address Ms. Tankersley's challenge to the excessive magnitude of the district court's departure; and (ii) fails to acknowledge that, absent the erroneous 12-level upward departure, the bottom of Ms. Tankersley's Guidelines range would have likely been only 12 months, or less than a third of the 41-month, bottom-of-the-range sentence ultimately imposed. (Pet. at 25-27.) Ms. Tankersley has also argued before the Ninth Circuit and this Court that the magnitude of the departure was unreasonable, citing a Seventh Circuit case, *United States v. Leahy*, 169

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[4] *Gall* was decided after Ms. Tankersley filed her Opening Brief in the Ninth Circuit.

F.3d 433, 438 (7th Cir. 1999), which reversed as unreasonable a slightly lesser (10-level) upward departure similarly imposed by analogy to the non-applicable terrorism enhancement. (Appellant's Opening Brief at 29; Pet. at 25-26.)[5]

Second, the United States' suggestion that the strict standard for harmless error is met whenever a sentence may be deemed "reasonable" (Brief in Opp. at 14) is incorrect. The Seventh Circuit recently emphasized the distinction between these two inquiries:

> It is important to emphasize that . . . our harmless error determination and review of the sentence's reasonableness are separate steps. . . . A finding of harmless error is only appropriate when the government has proved that the district court's sentencing error did not affect the defendant's substantial rights (here-liberty). To prove harmless error, the government must be able to show that he Guidelines error "did not affect the district court's selection of the sentence imposed." This is not the same thing as proving that the sentence was reasonable.

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[5] In keeping with its complete abdication of appellate review of most of the claimed departure errors, the court of appeals opinion fails to address *Leahy*. (*App.*, 1a-35a.)

United States v. Abbas, 560 F.3d 660, 667 (7th Cir. 2009) (finding Guidelines enhancement error harmless because the district court expressly stated that it would have imposed the same sentence even without the enhancement) (citations omitted).

II. Ms. Tankersley's Argument Regarding The Continuing Viability Of *Williams* After *Booker* Is Adequately Preserved.

The United States asserts a lack of preservation as to the second question presented – whether the holding in *Williams* that a sentencing court's use of an erroneous ground for departure constitutes an incorrect application of the Guidelines remains valid post-*Booker*. (Pet. at (i); Brief in Opp. at 15.) While it is accurate that before the court of appeals, Ms. Tankersley cited *Williams* in her Reply Brief but not in her Opening Brief, the *issue* of whether the use of an erroneous ground for departure constitutes an incorrect application of the Guidelines requiring reversal notwithstanding *Booker* was certainly raised in Ms. Tankersley's Opening Brief. (Appellant's Opening Brief at 21-29.) Thus, the United States apparently confuses preservation of an issue or claim with preservation of a particular argument in support of that claim or issue. This Court has cautioned against such confusion:

> Once a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below. Petitioners' arguments that the

> ordinance constitutes a taking in two different ways, by physical occupation and by regulation, are not separate *claims*. They are, rather, separate *arguments* in support of a single claim – that the ordinance effects an unconstitutional taking. Having raised a taking claim in the state courts, therefore, petitioners could have formulated any argument they liked in support of that claim here.
>
> A litigant seeking review in this Court of a claim properly raised in the lower courts thus generally possesses the ability to frame the question to be decided in any way he chooses, without being limited to the manner in which the question was framed below. . . . The petitioner can generally frame the question [presented] as broadly or as narrowly as he sees fit.

Yee v. Escondido, 503 U.S. 519, 534-35 (1992); see also *Harris Trust and Savings Bank v. Salomon Smith Barney Inc.*, 530 U.S. 238, 245 n.2 (2000) (rejecting assertion that petitioners had waived a certain statutory theory by neglecting to present it to the courts below, because petitioners' newly articulated focus on that provision was "merely an argument" in support of their squarely presented claim for relief based on another statutory provision); *Lebron v. National Railroad Passenger Corp.*, 513 U.S. 374 (1995) (this Court could properly consider an argument disavowed before the lower courts and not explicitly raised until the merits

briefs in this Court, because the argument was "not a new claim, but a new argument to support [an existing claim]" and was "passed upon below" and "was fairly embraced within the question presented and the argument set forth in the petition").

In any event, the specific argument concerning the continuing viability of *Williams* was "pressed below" (Appellant's Reply Brief at 28), and therefore, a grant of certiorari is not precluded. *United States v. Williams*, 504 U.S. 36, 41 (1992) ("Our traditional rule . . . precludes a grant of certiorari only when 'the question presented was not pressed or passed upon below.'"). Because "this rule operates in the disjunctive," *id.*, this conclusion is not altered by the fact that the court of appeals chose not to explicitly address the *Williams* argument. Moreover, it is inarguable that the court of appeals opinion implicitly rejects the continuing force of *Williams* as binding precedent. (App., 29a-31a.)

The United States offers no defense to the *Williams* argument on its merits, other than to reiterate its harmless error argument, addressed *supra* at 7-11. (Brief in Opp. at 15-16.)

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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